

Hypocrisy, Corruption, and Illegitimacy: Why Judicial Integrity Justifies the Exclusionary Rule

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I. INTRODUCTION

The United States Supreme Court has at various times justified the Fourth Amendment exclusionary rule as an inherent part of the Amendment, as dictated by judicial integrity, or as needed to deter police violations of the Amendment.¹ The Court has implicitly overruled the inherent-part-of-the-amendment argument and has largely ignored the judicial integrity argument.² For the Court, therefore, the Amendment's primary, perhaps sole, justification is deterrence.³ That has proven to be a weak rationale. A bare Court majority—but a majority nonetheless—insists that deterrence is little needed because police today rarely violate constitutional rights.⁴ Moreover, explains the Court, civil suits and professionalized internal police procedures abound as effective deterrent alternatives to the exclusionary rule.⁵

Empirical data and psychological and economic theory establish quite the opposite: law enforcement violations of Fourth Amendment protections are numerous, and the obstacles to alternative remedies so great as to render them

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¹ JAMES J. TOMKOVICZ, CONSTITUTIONAL EXCLUSION: THE RULES, RIGHTS, AND REMEDIES THAT STRIKE THE BALANCE BETWEEN FREEDOM AND ORDER 20–25 (2011); TRACEY MACLIN, THE SUPREME COURT AND THE FOURTH AMENDMENT EXCLUSIONARY RULE 6, 15, 83, 186–88 (forthcoming 2013) (manuscript pages).

² See TOMKOVICZ, *supra* note 1, at 24–25 (noting this point but also explaining that the Court has reimagined judicial integrity so that it only applies when the deterrence rationale applies; accordingly, “it is entirely accurate to say that deterrence has come to rule the Fourth Amendment exclusionary rule’s roost.”).

³ See *id.*

⁴ See *Hudson v. Michigan*, 547 U.S. 586, 597–99 (2006).

⁵ See *id.* Justice Kennedy, one member of the five-Justice majority in *Hudson*, emphasized in a concurring opinion, however, that “the continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt.” *Id.* at 603 (Kennedy, J., concurring).

largely meaningless.⁶ Furthermore, a Court majority, while perhaps not going as far as to call for ending the exclusionary rule, often finds that the deterrent benefits of wide application of the rule are so small, and so outweighed by countervailing concerns, as to merit the creation of numerous exceptions to the rule.⁷ The rule may thus be one vote away from dying, but its current life force is unquestionably on the wane.⁸

Various scholars and law reform organizations have tried to offer alternative justifications for the rule, hoping to cure its ills.⁹ These justifications have

⁶ See, e.g., David A. Harris, *How Accountability-Based Policing Can Reinforce—or Replace—The Fourth Amendment Exclusionary Rule*, 7 OHIO ST. J. CRIM. L. 149, 149 (2009) [hereinafter Harris, *Accountability-Based Policing*] (“But even if the exclusionary rule remains in place, recently published empirical findings cast doubt on the Court’s premise in *Hudson* that the bad old days of search and seizure violations lay behind us. On the contrary, viewing the data conservatively, roughly a third of all search and seizure activity violates the Fourth Amendment.”); *id.* at 181–86 (explaining that the qualified immunity doctrine and limitations on the availability of attorneys’ fees make the availability of litigation as an exclusionary rule alternative unusual and limited, while having little deterrent effect because individual officers do not pay the bills, and police departments view the matter as a cost of doing business); Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363 (explaining the sort of civil and administrative penalties regime—one not now prevailing—that psychological and economic theory and data suggest would be necessary to achieve effective deterrence of police violations of the Fourth Amendment).

⁷ See TOMKOVICZ, *supra* note 1, at 25–26.

⁸ See Sharon L. Davies & Anna B. Scanlon, Katz in the Age of *Hudson* v. Michigan: Some Thoughts on “Suppression as a Last Resort”, 41 U.C. DAVIS L. REV. 1035, 1068 (2008) (opining that Kennedy’s “cautionary language [in his concurring opinion in *Hudson*] may mean that [he] will be unwilling to provide that last-needed vote” to repeal the rule, while nevertheless noting that “Kennedy’s willingness to align himself with the most wide-reaching points” in the majority opinion “leaves this unclear”). Even if the rule does not soon die, leading commentators predict that the Roberts Court will “continue to eliminate the exclusionary remedy from entire categories of violations” and to “confine invocation of the exclusionary rule to cases of culpable police conduct” MACLIN, *supra* note 1, at 620; *Herring v. United States*, 555 U.S.135, 144 (2009) (declaring that, “[t]o trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system”). *But see* TOMKOVICZ, *supra* note 1, at 41 (describing any conclusion that this dicta portends a general culpability requirement in all Fourth Amendment suppression cases as premature).

⁹ See, e.g., Alfredo Garcia, *Toward an Integrated Vision of Criminal Procedural Rights: A Counter to Judicial and Academic Nihilism*, 77 MARQ. L. REV. 1, 17 (1993) (arguing that the exclusionary rule is inherent in the due process guarantees of the Fifth and Fourteenth Amendments); Ruth W. Grant, *The Exclusionary Rule and the Meaning of Separation of Powers*, 14 HARV. J.L. & PUB. POL’Y 173, 196–200 (1991) (arguing that separation of powers principles support the exclusionary rule).

included that it restores the status quo ante,¹⁰ serves as a retributive punishment of the police,¹¹ and gives the judiciary its only viable tool for reining in executive excesses in a system involving the separation of powers.¹² A few dissenting Justices have suggested that they continue to embrace the judicial integrity rationale, but they have explained their position largely only through use of buzzwords and catch phrases rather than offering any detailed explanation of just what it is judicial integrity means.¹³ Only two scholars, moreover, have attempted

¹⁰ Jerry E. Norton, *The Exclusionary Rule Reconsidered: Restoring the Status Quo Ante*, 33 WAKE FOREST L. REV. 261, 262, 283–94 (1998).

¹¹ David L. Gray, *A Spectacular Non Sequitur: The Supreme Court's Contemporary Fourth Amendment Exclusionary Rule Jurisprudence*, 50 AM. CRIM. L. REV. (forthcoming 2013) (manuscript) (arguing for an exclusionary rule based at least partly on retributive principles); cf. Andrew E. Taslitz, *The Expressive Fourth Amendment: Rethinking the Good Faith Exception to the Exclusionary Rule*, 76 MISS. L.J. 483 (2006) [hereinafter Taslitz, *Expressive Fourth Amendment*] (arguing, even before the Court decided *Herring*, that the Court had implicitly adopted a variant of a retributive justification for the exclusionary rule, though not endorsing that justification).

¹² See Timothy Lynch, *In Defense of the Exclusionary Rule*, 23 HARV. J.L. & PUB. POL'Y 711, 724–27, 737–41 (2000).

¹³ See *Herring*, 55 U.S. at 148, 151 (Ginsburg, J., dissenting, joined by Justices Stevens, Souter, and Breyer) (favoring “‘a more majestic conception’ of the Fourth Amendment and its adjunct, the exclusionary rule” than as a mere deterrent (quoting *Arizona v. Evans*, 514 U.S. 1, 18 (1995) (Stevens, J., dissenting))). Under this “more majestic conception,” the Fourth Amendment is seen as “a constraint on the power of the sovereign, not merely on some of its agents.” *Id.* at 151–152 (quoting *Evans*, 514 U.S. at 18). Because the Court is thus itself bound by the Fourth Amendment, admissibility of illegally-obtained evidence taints the judiciary with “partnership in official lawlessness,” while exclusion assures “the people—all potential victims of unlawful government conduct—that the government would not profit from its lawless behavior.” *Id.* at 152 (quoting *United States v. Calandra*, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting)). That assurance “minimize[s] the risk of seriously undermining popular trust in government.” *Id.* at 157 (citing *Calandra*, 414 U.S. at 361). Concluded Ginsburg, the majority’s opinion refusing to extend the exclusionary rule to police violations of the rule requiring that they generally knock and announce their authority and purpose was nothing less than a further “erod[ing] of the exclusionary rule,” rendering exclusion a mere “chimera.” *Id.* at 152. Ginsburg’s opinion seemed to be endorsing some version of the judicial integrity rationale, while also embracing the idea that the exclusionary rule is inherent in the Fourth Amendment itself. But Ginsburg spoke in broad generalities, appealing to what she seemed to see as judicial instinct rather than defining exactly how partnership in taint occurs or why and how it undermines public trust. Moreover, to the extent that Justice Ginsburg is talking about the integrity rationale, she seems to make its justification turn entirely on application of the exclusionary rule actually earning that trust—an empirical question. I will here try to offer a more detailed rationale for her claims, one that includes but does not alone turn on public trust in the judiciary and that, in any event, explores the available empirical data while refining just what it is the people must trust.

to defend the judicial integrity rationale in a systematic way.¹⁴ Both scholars have made statements broadly consistent with aspects of the arguments to come in this article.¹⁵ Both scholars rely, however, primarily on case law to craft their arguments rather than articulating a broader philosophical position or relying on empirical data.¹⁶ This article seeks to fill both these gaps by making an effort to revive the judicial integrity rationale for the exclusionary rule.

¹⁴ See Robert M. Bloom, *Judicial Integrity: A Call for Its Reemergence in the Adjudication of Criminal Cases*, 84 J. CRIM. L. & CRIMINOLOGY 462 (1993); Robert M. Bloom & David H. Fentin, "A More Majestic Conception": *The Importance of Judicial Integrity in Preserving the Exclusionary Rule*, 13 U. PA. J. CONST. L. 47 (2010); Michael J. Daponte, *Discretion and the Fourth Amendment Exclusionary Rule: A New Suppression Doctrine Based on Judicial Integrity*, 30 MCGEORGE L. REV. 1293 (1999). In a July 18, 2012 search of Westlaw in the law reviews and journals library using this query, "TI((judicial +5 integrity) & exclu! Suppress!)," I found only five articles. Only three of these five articles were devoted entirely to a defense of the exclusionary rule based on the integrity rationale, Professor Bloom having authored two of the three pieces. My subsequent search using the same query but not limiting the terms to appearing in the title revealed 2,715 articles discussing the integrity rationale but, minus the three articles found in the first search, not making that discussion the whole point of the piece. I did, however, find 392 articles mentioning the exclusionary rule, several of those articles debating its future, others offering rationales other than integrity as the piece's major focus, still others arguing for tweaking the exclusionary rule, further pieces criticizing the rule, and the bulk of the remaining pieces focusing on particular applications of the rule. Scholars thus seem to have given the integrity rationale short shrift, even when endorsing it.

¹⁵ See Bloom, *supra* note 14, at 464 ("The concept of judicial integrity may be described as the role of the judiciary in leading by example."); Bloom & Fentin, *supra* note 14, at 47–48 ("These two goals—to give effect to the Fourth Amendment right and to prevent the courts from serving as accomplices to unlawful behavior—reflect the Court's historical interest in preserving judicial integrity."); Daponte, *supra* note 14, at 1320–23 (conceding that judicial integrity still includes "avoidance of the condonation of wanton police misconduct by the courts," arguing for a broader, more flexible notion of integrity as fostering public confidence generally, including in the prosecution of the guilty, thus favoring a discretionary exclusionary rule—a vision at odds with both Bloom's and that articulated here). Bloom, in his original piece, articulates his vision more clearly than does Daponte. Bloom argues that judicial integrity concerns itself with public perceptions in two ways: first, promoting the courts' being "regarded as a symbol of lawfulness and justice"; second, the courts' "not appearing to be allied with bad acts." Bloom, *supra* note 14, at 464. But Bloom understands that long run faith in the rule of law, rather than temporary and fickle public opinion, is what integrity properly promotes. See *id.* at 497. In one sentence, Bloom also seems to recognize that eliminating the exclusionary rule is the declaration of a right without a remedy. See *id.* at 471. Finally, Bloom asserts that the exclusionary rule serves integrity by furthering the separation of powers—giving the courts their only effective remedy for taming constitutionally wayward legislatures and executives. See *id.* But Bloom merely asserts these points, supporting them based on precedent and comparative cross-country analysis rather than by drawing on and developing an overarching theory of integrity.

¹⁶ See Bloom, *supra* note 14; Daponte, *supra* note 14.

This article's argument proceeds as follows: first, the exclusionary rule is the only viable remedy for Fourth Amendment violations; second, a right without a remedy is no right at all; third, to claim there is such a right while in fact not providing it is a form of judicial hypocrisy—the very opposite of integrity—thereby inflicting social harm; and fourth, judicial integrity requires four things: (1) a wholeness among judicial words, motivations, and deeds; (2) judicial accountability for these things; (3) the parties' perception of fair procedures, especially the opportunity for effective voice (voice that might make a real difference) about constitutional claims; and (4) the informed public's perception that the courts' actions are legitimate *because* they reflect the preceding three conditions, not necessarily because the public agrees with any particular court decision. Eliminating the exclusionary rule while claiming that Fourth Amendment rights still exist violates each of these four precepts: the court acts hypocritically, it denies constitutional objectors a voice because no suppression or other hearing is held, it frees the judiciary (and the police) from accountability because the court must never make a decision requiring it to justify its own or the police's actions, and it actually contradicts *informed* public opinion, which in fact favors the exclusionary remedy. These realities constitute a kind of corruption: a disease eating away at the judicial body, changing it from the healthy arbiter trying to make neutral, fair, consistent decisions that it is supposed to be into something more overtly political. That corrupt perversion of the judiciary's essential nature is inconsistent with judicial integrity.¹⁷ Accordingly, the exclusionary rule's existence is mandated by the dictates of integrity, though whether exceptions or modifications of the rule are permitted by those dictates is a question for another day.

Part II of this article makes the case that the exclusionary remedy for Fourth Amendment violations is the only viable one. Claiming that Fourth Amendment rights exist post-elimination of the exclusionary rule is a kind of hypocrisy because *there are no rights without remedies*. Part III continues by exploring the nature of hypocrisy and why it is a social evil, especially when engaged in by the judiciary. That evil occurs, Part III explains, even if judges are not consciously aware of their hypocrisy. Part III ends by rebutting arguments that judicial hypocrisy is psychologically and politically inescapable or a positive social good.

Part IV explains why judicial integrity is inconsistent with hypocrisy but also requires more than just hypocrisy's absence. Part IV undertakes this task by first exploring the nature of integrity generally. That exploration reveals that integrity

¹⁷ This concept of corruption implies a certain set of proper emotional responses by the judiciary, specifically disgust—prompting a desire to expel or banish the offending evidence—rather than retribution, prompting a desire to punish. *Compare infra* note 340 (discussing disgust) *with* Gray, *supra* note 11 (discussing retribution). I do not have the space to address the emotional life of the exclusionary rule here but do so in a companion piece. See Andrew E. Taslitz, *From Disgust to Retribution: The Role of Judicial Emotions under the Exclusionary Rule* (forthcoming 2013).

is partly a set of character traits requiring a commitment to principled consistency, even at great personal cost, while relying on principles that are morally defensible in a given political culture. But integrity also requires a commitment to explaining the underlying principles and why keeping them consistent requires a particular result. That explanation is done for the very purpose of allowing critique, thus fostering accountability and error correction. Explanation also furthers others' perception of integrated action. Integrity, properly understood, requires, in addition to objective consistency, precisely this perception of its existence among relevant audiences. Perfect consistency is not required. But the commitment to try, the availability of character traits making success more likely, and the willingness to face critique based upon candidly and completely-stated reasons for action are all necessary.

Part IV next turns specifically to *judicial* integrity, explaining why the judge's role still requires judges with certain personality traits and facing candid accountability for action. Part IV elaborates on what this means in the context of the judge's position in a democratic republic. Ending the exclusionary rule, by ending any need for judges to defend their actions and their tolerance of police actions in the face of citizen objection, eliminates accountability and frees the judge from the tests of character required to determine whether she is in fact up to the task of sticking to the law's principles. Part IV then discusses the factors that undermine integrity, explaining why courts adopting the very language of integrity and faced with defending the concept are indeed more likely to act *with* integrity.

Part IV continues by explaining why the elimination of the exclusionary rule would be a form of judicial corruption because it is inconsistent with the core features that define courts' identity *as courts*, namely as bodies that aspire to relatively neutral, consistent, principled decision making. Part IV ends by examining psychological research showing that the opportunity that fair suppression hearings offer for effective voice promotes judicial legitimacy in the eyes of the parties and the informed public (which is not necessarily the same as the public that responds to quick opinion polls). Part IV also examines experimental research suggesting that the informed public supports the exclusionary rule precisely because it is essential to judicial integrity. Part IV considers some implications of these conclusions and suggestions for the future.

II. A RIGHT WITHOUT A REMEDY

This section of this article argues first that exclusion is the only viable remedy available for most Fourth Amendment violations, and, second, that eliminating that remedy leaves a right without a remedy—which is indeed no real right at all. But to say there is a right when there is not is a form of judicial hypocrisy, which will be the subject of Part III. Such hypocrisy causes various systemic ills.

Understanding the second point—that a right without a remedy is no right at all—requires understanding why we have rights in the first place: to obtain instrumental goals, to express society's recognition of individual and group worth,

and to offer persons and groups aggrieved the opportunity for effectively voicing their objections. Ending the exclusionary rule and thus the availability of suppression hearings denies defendants the opportunity for instrumental gain in the form of evidentiary exclusion, treats them as persons unworthy of full and equal recognition as citizens, and further denies them the opportunity to voice their constitutional claims in hearings. That judicial hypocrisy, Section III will next reveal, undermines public trust and judicial accountability, while fostering the continuation of governmental error.

A. *Exclusion is the Only Viable Remedy*

In *Hudson v. Michigan*,¹⁸ the Court insisted that police have become so professionalized since the 1960s that few violations of the Fourth Amendment now occur.¹⁹ Furthermore, explained the Court, civil rights laws have evolved to provide ample modern opportunity for effective remedies other than the exclusionary rule, such as via tort suits.²⁰ Those remedies have proven so successful, concluded the Court, because hordes of civil rights lawyers seek to sue law enforcement to obtain purportedly fat lawyers' fees.²¹ These suits thus can continue to ensure that Fourth Amendment violations are adequately deterred.²²

These assertions are startling. Fourth Amendment violations are far from infrequent. Stop-and-frisk scandals in Philadelphia and New York City, in which many thousands of persons were allegedly stopped and frisked, arguably without the proper reasonable suspicion, stand as potential testaments to this failure.²³ A

¹⁸ 547 U.S. 586 (2006).

¹⁹ See *id.* at 597–99 (refusing to force “the public today to pay for the sins and inadequacies of a legal regime that existed almost half a century ago.”). Continued the Court: “[W]e now have increasing evidence that police forces across the United States take the constitutional rights of citizens seriously.” *Id.*

²⁰ See *id.* (noting the extension of 42 U.S.C. § 1983 damages to municipalities and the purported expansion of the section 1983 remedy via case law). The Court also praised the greater availability of administrative and related remedies, such as a new emphasis on officer discipline, improved training, and enhanced citizen review, though the Court focused more heavily on the litigation option. See *id.*

²¹ See *id.* (noting the supposed irrelevance of small damages as potentially discouraging suits because 42 U.S.C. § 1988(b) provides for the availability of attorneys' fees, a remedy “unavailable in the heydays of our exclusionary rule jurisprudence” and supplemented by the greatly expanded current number of “public interest law firms and lawyers who specialize in civil-rights grievances . . .”).

²² See *id.*

²³ See *Mahari Bailey v. City of Philadelphia*, No. 10–5952 (E.D. Pa. June 21, 2011) (documenting parties' agreement to dramatic changes in stop-and-frisk practices by the Philadelphia police in light of allegations of widespread abuse); Al Baker, *New York Police Release Data Showing Rise in Number of Stops on Streets*, N.Y. TIMES, May 13, 2012, at A19 (recounting allegations of stop-and-frisk abuse and supporting data offered by the New York Civil Liberties Union). It is important to note that the occasional successful suit,

recent observational study by Jon Gould and Stephen D. Mastrofski found that thirty percent of the searches routinely conducted by the police violated the Fourth Amendment.²⁴ Yet the officers in this study knew that they were being observed, suggesting that the usual, unobserved violation rate may be much higher.²⁵ Most of these violations did not result in obtaining evidence, and thus suppression could not have been a remedy.²⁶ But neither did the police seem to harbor any fear that they or their departments might be subject to individual or departmental lawsuits, much less to internal administrative penalties. If the officers did believe that these outcomes were plausible, that fear did not deter their behavior.²⁷

Indeed, the data more generally reveal that tort damages suits do little, if anything, to deter law enforcement's violating Fourth Amendment dictates.²⁸ Such damages are rare, but, even when they involve substantial amounts, they do not change police behavior.²⁹ As Professor David Harris has noted, "the idea that those in charge of a police department will respond at some point to the fiscal pain of escalating damages for police misconduct by imposing meaningful reforms has no basis in fact."³⁰ Indeed, continues Harris, "[s]tudies of imposing damages on police departments as a reform strategy show little evidence of any direct changes in police departments, despite the presence of some small victories forcing 'local departments to adopt a new or revised policy on a particular aspect of police operations.'"³¹ The combination of current tort, administrative, and exclusionary

such as Philadelphia's, ending in a consent decree, does not establish that civil suits are generally successful deterrents. Moreover, a consent decree orders *future* changes in policy. It does not provide a remedy for the rights of specific persons that have already been violated.

²⁴ Jon B. Gould & Stephen D. Mastrofski, *Suspect Searches: Assessing Police Behavior Under the U.S. Constitution*, 3 CRIMINOLOGY & PUB. POL'Y 315, 331 (2004).

²⁵ See *id.* at 326.

²⁶ Evidence was seized in only three percent of the cases. See *id.* at 332. One-third of the suspects searched were searched illegally, translating into six to seven unconstitutional searches per hundred residents every year. See *id.* at 331.

²⁷ See *id.*

²⁸ See SAMUEL WALKER, *THE NEW WORLD OF POLICE ACCOUNTABILITY* 32, 32 (2005).

²⁹ See Harris, *Accountability-Based Policing*, *supra* note 6, at 156–57.

³⁰ *Id.* at 156.

³¹ *Id.* Professor David Sklansky starkly points out the following:

To begin with, there is the simple issue of scale. The best figures suggest that about 2000 police misconduct cases are filed each year under section 1983. Compare that to the number of criminal cases thrown out each year, by judges or prosecutors, based on Fourth Amendment violations. A conservative estimate of *that* figure is upwards of 300,000. Three-hundred-thousand is a tiny fraction—about 2 percent—of the 13 million annual arrests in the United States. But it is two orders of magnitude larger than the number of civil damage actions. And of course the vast majority of those 2000 civil damage actions are unsuccessful.

remedies thus has a weak record of deterrence relative to the job remaining to be done.³²

Apart from the question of deterrence, the exclusionary rule cannot remedy the many constitutional search and seizure violations affecting the innocent precisely because they do not result in seized evidence to suppress.³³ But that does not mean that alternative remedies are available in such no-evidence-found cases. Indeed, both statutory and Court-created obstacles to civil recovery for Fourth Amendment violations are legion.³⁴ These include doctrines of standing (limiting who can sue), qualified immunity (limiting who can be sued), intent requirements

David Alan Sklansky, *Is the Exclusionary Rule Obsolete?*, 5 OHIO ST. J. CRIM. L. 579–580 (2008). Of course, Sklansky explains, perhaps these relatively few section 1983 suits have an impact that outsizes their numbers. That is unlikely, Sklansky argues, using as an example the elimination of the exclusionary rule for state constitutional violations in California, which, the evidence suggests (at least in the one area Sklansky chose for illustration), has resulted in California police thoroughly ignoring state constitutional rules not also mandated by the federal Constitution. *See id.* at 580–81. Sklansky also notes the availability since 1995 of United States Department of Justice structural injunctive relief under 42 U.S.C. § 14141, but notes that only a very small number of these suits are brought. Sklansky further notes that several studies of police stop-and-frisk policies conclude that arrests were far more likely to result from constitutionally valid searches than invalid ones, suggesting that officers do at least consider admissibility in making constitutional-compliance decisions. *See id.* at 582.

³² *See* Slobogin, *supra* note 6 (arguing that only a top-down re-design of current administrative and other penalties is likely to deter police Fourth Amendment violations). One lower court in a case involving a search of an automobile passenger put it this way:

While the Supreme Court *may be right* about the increased professionalism of police and the robustness of the § 1983 plaintiffs' bar, we cannot say that either racial profiling or reliance on anonymous tips has declined in frequency in recent years, *or that civil lawsuits will adequately deter such practices*. Nor can we say that the various other categories of cases that give rise to passenger suppression motions are rare, decreasing, *sufficiently internally disciplined, or otherwise deterred*.

United States v. Mosley, 454 F.3d 249, 268 (3d Cir. 2006) (emphasis added). *See also* Sklansky, *supra* note 31, at 582 (concluding that the “new police”—given several improvements in policing in the last few decades—have still not rendered the exclusionary rule unnecessary as a deterrent); Samuel Walker, *Thanks for Nothing, Nino*, L.A. TIMES, June 25, 2006, at M5 (criminologist responding to what he saw as misuse of his work by Justice Scalia in *Herring* by noting that, in Walker's view, those improvements in policing that have occurred are attributable to changes in police culture *prompted and sustained by the exclusionary rule*). *See also* Bloom and Fentin, *supra* note 14, at 67 (noting that even damages verdicts usually do not change police department behavior because police react more to political incentives than market ones, and individual officers are generally indemnified and protected by ever-expanding qualified immunity).

³³ *See* Sklansky, *supra* note 31, at 581–82.

³⁴ *See generally* Sean P. Trende, *Why Modest Proposals Offer the Best Solution for Combating Racial Profiling*, 50 DUKE L.J. 331, 341–54 (2000).

for some claims,³⁵ and the elimination in many cases of attorneys-fees that are supposedly ordinarily available via statute.³⁶ Moreover, damages are usually small, creating little incentive to sue,³⁷ while the chances of recovery are equally small.³⁸ As several commentators have noted, jurors tend to identify with the police rather than the criminal suspect, even if the latter turns out to be innocent.³⁹ The police are just doing their job of protecting the public. Jury resistance to rendering verdicts for plaintiffs in such cases is even stronger where police do find evidence linking the suspect to a crime.⁴⁰ The jurors have little compassion for (apparently) proven criminals.⁴¹

³⁵ See *id.*

³⁶ See Jennifer Mercer and William Ewell, *Procedural Means of Enforcement Under 42 U.S.C. § 1983*, 88 GEO. L.J. 1753, 1758, n.2881 (2000) (Section 1988 attorneys' fees often not awarded where there were nominal damages); Layne Rouse, *Battling For Attorneys' Fees: The Subtle Influence Of "Conservatism" In 42 U.S.C. § 1988*, 59 BAYLOR L. REV. 973, 974 (2007) (noting recent amendment's limiting § 1988's application and arguing that lower courts unnecessarily reduce fees to prevailing plaintiff's attorneys' in civil rights cases because of an anti-enforcement bias).

³⁷ Justice Scalia seemed to admit this point in *Hudson* but argued that attorneys seeking fees under civil rights statutes would pursue the cases anyway. See *Hudson v. Michigan*, 547 U.S. 586, 597–98 (2006).

³⁸ See Sklansky, *supra* note 31, at 572 ("Chief among the new barriers to suing the police, of course, are the expanding doctrines of official immunity, which alone take Avery, Rudovsky and Blum [mis-cited by Justice Scalia in *Hudson*] more than 120 pages to describe. More and more, these doctrines look like the Blob That Ate Section 1983.").

³⁹ As Judge Guido Calabresi has put it:

The reason that tort suits—that great American pastime—work the way they do in most civil cases is because juries identify with the plaintiff. They see the plaintiff as someone like themselves and consequently decide in favor of the plaintiff.

Jurors are considerably more reluctant to identify with a criminal defendant who brings a tort action against the police for violation of his rights. In these cases, the plaintiff is a criminal and the jurors do not see themselves in that way

[T]he mechanism works a little bit better when the illegal search [is] of innocent people. Even there, however, the jurors tend not to identify with the people searched. All too often, jurors think those people are the sort likely to be criminals even if they have not committed a crime in the case at hand.

Guido Calabresi, *The Exclusionary Rule*, 26 HARV. J.L. & PUB. POL'Y 111, 114–15 (2003).

⁴⁰ See *id.*

⁴¹ See Andrew E. Taslitz, *Trying Not to Be Like Sisyphus: Can Defense Counsel Overcome Pervasive Status Quo Bias in the Criminal Justice System?*, __TEX. TECH L. REV. __, (forthcoming 2013) (manuscript at 47–48) [hereinafter Taslitz, *Status Quo Bias*] (arguing that the "status quo bias" leads most jurors to assume that police and prosecutors arrest the guilty, or at least the undeserving, affecting their credibility assessments of suspects).

Furthermore, those most likely to bring suit where there are significant damages or to make a political point are the wealthy, the well-educated, and the politically-savvy.⁴² Most criminal defendants, the bulk of whom are indigent, do not fit this description. They lack “the means, the pluck, or the equities predictive of success in tort to actually sue”⁴³ Additionally, they are disproportionately members of racial minorities.⁴⁴ The result in a regime without an exclusionary rule is that such minorities and the poor would be disproportionately denied any remedy whatsoever.⁴⁵ Current administrative remedies, despite their rarity and relative ineffectiveness,⁴⁶ also do not provide a remedy to aggrieved individuals. That an officer might suffer some mild “punishment,” perhaps a reprimand or less of an opportunity for advancement,⁴⁷ is little satisfaction to a person wrongly searched in a particular case, who receives no benefit from this action. The same observation of no individual benefit can be made about changes in police policy that benefit only potential future suspects.

Indeed, the importance of providing a remedy for *every* aggrieved individual cannot be understated. Constitutional rights, including the Fourth Amendment, may seek to serve many social purposes, but among them is protecting the individual from the unjustified use of the overweening power of the state.⁴⁸ The Court has recognized that the Fourth Amendment does create an *individual* right,⁴⁹

⁴² See Donald Dripps, *The “New” Exclusionary Rule Debate: From “Still Preoccupied with 1985” to “Virtual Deterrence”*, 37 FORDHAM URB. L.J. 743, 771 (2010).

⁴³ See *id.*

⁴⁴ See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010) (documenting this reality and its causes).

⁴⁵ See STEPHEN J. SCHULHOFER, *MORE ESSENTIAL THAN EVER: THE FOURTH AMENDMENT IN THE TWENTY-FIRST CENTURY* 68 (2010) (“There is no evidence to support (and much evidence to contradict) the Court’s assumption [in *Hudson*] that internal police discipline and civil damage liability provide all the incentives needed to ensure fair treatment [of racial minorities].”).

⁴⁶ See Slobogin, *supra* note 6, at 385–86, 393–97.

⁴⁷ See *id.*; WALKER, *supra* note 28, at 25–26 (2005).

⁴⁸ Andrew E. Taslitz, *The Fourth Amendment in the Twenty-First Century: Technology, Privacy, and Human Emotions*, 65 LAW & CONTEMP. PROBS. 125, 164 (2002) (“Once a right is recognized as fundamental, however, the right generally resides, in our tradition, in the individual.”); see generally MILTON R. KONVITZ, *FUNDAMENTAL RIGHTS: HISTORY OF A CONSTITUTIONAL DOCTRINE* (2001) (discussing more generally the nature of fundamental constitutional rights).

⁴⁹ See Thomas K. Clancy, *The Fourth Amendment as a Collective Right*, 43 TEX. TECH L. REV. 255, 255 (2010) (arguing that the Court continues rhetorically to treat the Fourth Amendment substantive right as an individual right but in practice too often edges toward a collective security concept of the right); Donald L. Doernberg, *“The Right Of The People”: Reconciling Collective And Individual Interests Under The Fourth Amendment*, 58 N.Y.U. L. REV. 259, 260 (1983) (arguing that the Court focuses on Fourth Amendment rights as individual ones but implicitly recognizes a collective rights-notion too but in a

though the Court wrongly declares that there is no individual right to the exclusionary remedy—that is, that the remedy is judicially-created to serve the societal goal of deterring the police rather than to protect the aggrieved individual.⁵⁰ If certain minimal rights define each individual's humanity, however—a point I have defended elsewhere—then denying those rights to serve community needs makes the community primary, the individual secondary.⁵¹ That violates human dignity. The idea of the individual as “sovereign” is corrupted.⁵² As Justice Frank Murphy wrote in 1949, and as is still true today, in practice, “there is but one alternative to the rule of exclusion. That is no sanction at all.”⁵³

If this is true, then eliminating the exclusionary rule would create a right without a remedy. But that, I will argue, is to create no right at all.

B. *A Right Without a Remedy Is No Right at All*

As Justice John Marshall said as long ago as *Marbury v. Madison*,⁵⁴ “The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right.”⁵⁵ Why this is so turns, however, on understanding why we have rights in the first place, namely to serve three basic functions: one instrumental, one expressive, one vocal.

1. The Instrumental Function

The instrumental function of rights is to give their bearers access to certain benefits to which society deems them entitled.⁵⁶ These benefits may be material or intangible. For example, a right might entitle the wronged individual to money,

way that distorts the Fourth Amendment's meaning and limits its application); Erik G. Luna, *Sovereignty and Suspicion*, 48 DUKE L.J. 787, 787 (1999) (arguing that the Fourth Amendment embraces an individual rights model but that the Court is sometimes at least implicitly tempted by other models).

⁵⁰ See *United States v. Calandra*, 414 U.S. 338, 347–48; but see TOMKOVICZ, *supra* note 1, at 35 (arguing that the Court has continued to act as if the individual rights model controls in standing doctrine, even though that is inconsistent with the Court's switching the exclusionary rule from the rights model to a mere deterring future violations model).

⁵¹ See Taslitz, *Twenty-First Century*, *supra* note 48, at 162.

⁵² See *id.*

⁵³ *Wolf v. Colorado*, 338 U.S. 25, 41 (1949) (dissenting opinion). *Wolf* would, of course, eventually be overruled in *Mapp v. Ohio*, 367 U.S. 643 (1961).

⁵⁴ 5 U.S. 137, 162–63 (1803).

⁵⁵ *Id.* at 162–63.

⁵⁶ See BETH J. SINGER, PRAGMATISM, RIGHTS, AND DEMOCRACY 24 (1999) (“One who ‘has a right,’ in the conventional sense of this expression, is entitled to possess something, to act in a particular way, or to be accorded a particular sort of treatment.”).

access to land, or freedom to build a home in a particular area.⁵⁷ Rights can also often be sold or exchanged for other material benefits.⁵⁸ The rights themselves thus have market value. Rights can, furthermore, bring with them power, both private power, such as the ability to compel another person to complete a contract or to stay off your land, and political power.⁵⁹ An example of political power is the power to persuade others to change their thoughts or behavior by speaking, one essential benefit of the First Amendment right to freedom of speech.⁶⁰

In the case of the Fourth Amendment, a defendant's desired instrumental value is exclusion of evidence against him at trial, thus making it harder, occasionally impossible, to convict him of a crime. Where, as I have argued here, other remedies are unavailable, only exclusion brings instrumental gain.⁶¹ Certainly, to the defendant, exclusion is the most important gain of all. Merely for a court to declare, "Your Fourth Amendment rights have been violated, but you will get nothing for this wrong done to you" is of no instrumental value. Moreover, even though exercising political power may not be a defendant's goal in seeking suppression, fostering such power is often just what the remedy does.⁶² It gives members of the poor and racial minorities a tool to challenge police abuse and gain power vis-à-vis the state by depriving the state of an instrument of its own

⁵⁷ See, e.g., Diane Leenheer Zimmerman, *Information as Speech, Information as Goods: Some Thoughts on Marketplaces and the Bill of Rights*, 35 WM. & MARY L. REV. 665, 665 (1993) (analyzing information as an intangible property right).

⁵⁸ See *id.* at 665 ("Coexisting with the line of theory and analysis that renders words, ideas, and facts usable by all are doctrines that limit such use by directly or indirectly converting information into a form of private property, the access to and use of which can be denied and transferred according to the dictates of the commercial marketplace.").

⁵⁹ See STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES* 17 (1999) ("Rights in the legal sense have 'teeth.' They are therefore anything but harmless or innocent. Under American law, rights are powers granted by the political community.").

⁶⁰ See, e.g., STEVEN H. SHIFFRIN, *DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA* 92–93 (1999) (arguing that one of dissent's major values is its promotion of a dialectical exchange about injustice that sometimes changes minds and thus the unjust actions being challenged).

⁶¹ Cf. MATTHEW E. K. HALL, *THE NATURE OF SUPREME COURT POWER* 4–5, 49–61 (2011) (arguing that the Court's recognition of rights is successful either when lower courts can implement them directly or the public does not oppose them and that, the data suggest, the exclusionary rule was successful in bringing instrumental value to significant numbers of criminal suspects who previously were deprived of such value).

⁶² See, e.g., Andrew E. Taslitz, *Fourth Amendment Federalism and the Silencing of the American Poor*, 85 CHI.-KENT L. REV. 277, 280 (2010) [hereinafter Taslitz, *Fourth Amendment Federalism*] (arguing that denying poor racial minority group members arrested for suspected crimes a suppression remedy for the violation of state statutory or constitutional rights reflects, and further denies, the group political power).

power.⁶³ The suppression hearing itself also gives criminal defendants, through their counsel, the ability to monitor police abuses.⁶⁴ Because of the public nature of the trial, serious abuses will come to light, empowering the broader American people as well.⁶⁵

2. The Expressive Function

Rights also have expressive value.⁶⁶ Rights are partly constitutive of an individual's identity.⁶⁷ A citizen without rights would be no citizen at all.⁶⁸ The rights-bearing citizen expects to be able to speak her mind in public, to challenge discrimination in the workplace, to raise her children largely as she sees fit.⁶⁹ She gains a self-understanding as a more autonomous person because she is a person declared to have rights.⁷⁰

⁶³ In this sense, seeking suppression is a form of dissent against police abuses of power, and the suppression remedy a means of allowing that dissent at least occasional success in changing government action. *Cf.* SHIFFRIN, *supra* note 60, at 92–93 (discussing social value of dissent). It changes government action either by deterring future police wrongs or by depriving the state of the benefit of its wrongdoing, thus reducing (without always eliminating) its power to convict the aggrieved individual. That can translate into direct enhanced power for the individual, perhaps at least in obtaining a more favorable plea bargain. *See* HALL, *supra* note 61, at 53. The commodity exchanged in such pleas is in part the degree and length of the defendant's physical freedom. It is irrelevant whether the offender intended an act of dissent or acted purely in self-interest. The instrumental effects on the distribution of power are the same.

⁶⁴ *See* Andrew E. Taslitz, *Slaves No More! The Implications of Informed Citizen Ideal for Discovery Before Fourth Amendment Suppression Hearings*, 15 GA. ST. U. L. REV. 709–79 (1999) [hereinafter Taslitz, *Slaves No More*] (making this argument).

⁶⁵ *See id.* at 727–34, 757–61.

⁶⁶ *See* MICHAEL SCHUDSON, *THE GOOD CITIZEN: A HISTORY OF AMERICAN CIVIC LIFE* 240–74, 299–309 (1998) (illustrating the many ways that rights-talk suffuses our everyday life).

⁶⁷ *See id.* at 240–74, 300–309 (explaining the idea of the “rights-bearing citizen”); Stephen Worchel, *The Rightful Place of Human Rights: Incorporating Individual, Group, and Cultural Perspectives*, in *THE PSYCHOLOGY OF RIGHTS AND DUTIES: EMPIRICAL CONTRIBUTIONS AND NORMATIVE COMMENTARIES* 197, 202 (Norman J. Finkel & Fathali M. Moghaddam eds., 2005) [hereinafter *PSYCHOLOGY OF RIGHTS*] (“Stealing one’s rights is tantamount to chipping away part of one’s being.”); JOSEPH RAZ, *VALUE, RESPECT, AND ATTACHMENT* 22 (2001) (“Consciousness of . . . [certain rights] may be important to our sense of who we are.”).

⁶⁸ *See* SCHUDSON, *supra* note 66, at 309.

⁶⁹ *See id.* at 299 (“Women and minorities . . . do politics [as rights-bearing citizens] when they walk into a room, anyone’s moral equals, and expect to be treated accordingly. The gay and lesbian couples in Hawaii in 1991 or in Vermont in 1997 are political when they try to be legally married . . .”).

⁷⁰ *See, e.g.*, Siegfried Hoppe-Braff and Hye-On Kim, *Understanding Rights and Duties in Different Cultures and Contexts: Observations from German and Korean*

Symbolically, law and how it is implemented also send messages about who counts as equal members of the political community and what fundamental moral principles define that community.⁷¹ These messages are especially powerful in the context of constitutional rights.⁷² In a political culture that treats the Constitution as a sacred text of a secular religion,⁷³ the Constitution's protections have particular expressive power in defining an individual as an equal member of our political community.⁷⁴ If that member belongs to a group recognizable as having faced de jure or de facto exclusion by the law in the past, extending law's protections to that member also sends messages about the equal value of his group.⁷⁵ Correspondingly, denying those protections sends reprehensible messages.⁷⁶

Law can thus impose degrading meanings as well as uplifting ones, and law does so by the daily practices of legal actors and ordinary civilians acting in the shadow of the law.⁷⁷ The segregated beaches, buses, and water fountains of the Jim Crow era are therefore described by one leading constitutional scholar as subjecting African-Americans to thousands of daily "degradation ceremon[ies]" shaping the "life of every black person within the system's reach."⁷⁸ Critical legal scholars make a similar point when they seek to challenge the reigning legal "narratives," drawing on the experiences of the subordinated to challenge, modify,

Adolescents, in *PSYCHOLOGY OF RIGHTS*, *supra* note 67, at 49, 68 (reporting the results of an empirical study suggesting a cross-cultural understanding of rights as relating to "the experience of autonomy and power").

⁷¹ See generally KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* (1989) [hereinafter KARST, *BELONGING TO AMERICA*] (making this argument at book-length).

⁷² See *id.*; Andrew E. Taslitz, *Respect and the Fourth Amendment*, 94 NW. J. CRIM. L. AND CRIMINOLOGY 15, 55–57 (making similar point by explaining that limitation or denial of Fourth Amendment rights in ways that disparately affect disempowered groups mark the members of such groups as "sub-persons").

⁷³ See SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (2011) (describing our "secular civil religion" of faith in the Constitution while simultaneously deriding it).

⁷⁴ See KENNETH L. KARST, *LAW'S PROMISE, LAW'S EXPRESSION: VISIONS OF POWER IN THE POLITICS OF RACE, GENDER, AND RELIGION* 8–20 (1993) [hereinafter KARST, *LAW'S EXPRESSION*] (discussing how constitutional rights' expressive power can affect individual and group social and political status, having real-world consequences).

⁷⁵ See KARST, *LAW'S EXPRESSION*, *supra* note 74, at 90–91 (arguing that *Brown v. Board of Education* and its successors contributed significantly to persuading many Whites that the Jim Crow culture of extreme racial subordination and the social meanings of group inequality that sustained it had to end); Worchel, *supra* note 67, at 205 ("Groups, like individuals, grapple with issues of identity, recognition, and value [including concerning rights], and this struggle has a profound effect on the interpersonal relations that take place within the group and between members of different groups.").

⁷⁶ See KARST, *LAW'S EXPRESSION*, *supra* note 74, at 87.

⁷⁷ See Taslitz, *Respect and the Fourth Amendment*, *supra* note 72, at 55–57 (analyzing and illustrating this phenomenon in the Fourth Amendment context).

⁷⁸ KARST, *BELONGING TO AMERICA*, *supra* note 71, at 4.

or reject the stories that the law on the books and as practiced tell about the nature of our social world.⁷⁹ Law is accordingly “a normative system that resides in the minds of the citizens of the society.”⁸⁰

Although, at their worst, legal rights can promote a form of competitive, isolated individualism, at their best they can aid in bonding disparate persons and groups into a single political community despite enduring differences among the community’s members.⁸¹ Protection by the law, most importantly by constitutional law, thus likewise affects social status, which brings with it psychological benefits and greater access to material and other resources.⁸² Constitutional law in the context of a criminal trial has particular significance for social status. A criminal conviction is deeply stigmatizing.⁸³ It also seeks to reinforce society’s most important social norms by punishing violators.⁸⁴

But a right without a remedy lacks the appropriate expressive power. This point is clarified by analogy to the writings of expressive retributivists about a different problem: how to justify imprisonment or similarly harsh punishment of criminal offenders.⁸⁵ Expressivists view the purpose of retributive punishment as refuting the wrongdoer’s message that his needs are more important than his victim’s because he is of greater worth.⁸⁶ Philosopher Jean Hampton notably discusses a case involving extreme violence. Hampton explains that merely denouncing the offense orally or in writing but without some kind of punishment sends an insufficient message.⁸⁷ The words ring hollow. “To be strung up,

⁷⁹ See Andrew E. Taslitz, *What Feminism Has to Offer Evidence Law*, 28 SW. U. L. REV. 171, 181 (1999).

⁸⁰ See Thomas Carothers, *The Rule-of-Law Revival*, in PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 3, 20 (Thomas Carothers ed., 2006) [hereinafter RULE OF LAW ABROAD].

⁸¹ See WILLIAM A. EDMUNDSON, AN INTRODUCTION TO RIGHTS (2004) (boiling rights justifications down to two theories, both serving primarily the interests of the individual as an individual); Andrew E. Taslitz, *Judging Jena’s D.A.: The Prosecutor and Racial Esteem*, 44 HARV. C.R.-C.L. L. REV. 393, 416–38 (2009) [hereinafter Taslitz, *Judging Jena*] (discussing rights’ bonding function).

⁸² See ANDREW E. TASLITZ, RAPE AND THE CULTURE OF THE COURTROOM 70–71, 112–13 (1999) [hereinafter TASLITZ, RAPE AND CULTURE].

⁸³ See Andrew E. Taslitz, *The Inadequacies of Civil Society: Law’s Complementary Role in Regulating Harmful Speech*, 1 MARGINS 305, 356–58 (2001) [hereinafter Taslitz, *Civil Society*]; Taslitz, *Judging Jena*, *supra* note 81, at 415–24; Andrew E. Taslitz, *The Incautious Media, Free Speech, and the Unfair Trial: Why Prosecutors Need More Realistic Guidance in Dealing with the Press*, 62 HASTINGS L.J. 1285, 1298–1307 (2011) [hereinafter Taslitz, *Incautious Media*].

⁸⁴ See Taslitz *Civil Society*, *supra* note 83, at 356.

⁸⁵ See *id.* at 342–50 (discussing expressive retributivism).

⁸⁶ See *id.*

⁸⁷ See Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV 1659, 1675–76, 1678–79 (1992).

castrated, and killed is to suffer a severe diminishment. This representation of degradation requires more than just a few idle remarks to deny.”⁸⁸ Most Fourth Amendment violations do not involve this sort of horrifying violence. But, if to a lesser extent, the point still applies. To declare to a defendant, “The police have violated your rights, but we will do nothing about it other than to say it is so” seems like empty words. Words alone come too cheaply.

3. The Voice Function

Law also serves an important role in giving individuals and groups voice in their fate.⁸⁹ Rights frequently are sufficiently ambiguous that their meaning is debatable in individual cases.⁹⁰ Deliberation is therefore required in each case for a court to determine what a right means.⁹¹ Yet an individual’s fate—his money, freedom, future life prospects—turns on this decision. He needs a voice to improve the trustworthiness of the court’s judgment so that competing arguments are fully aired.⁹²

But, just as recognition of a right has expressive value, so too does direct involvement in the rights-creation and application process have such value.⁹³ Voice-promoting procedures matter because of the “feedback information” they convey to the self.⁹⁴ Specifically, fair procedures address three core psychological needs: autonomy, relatedness, and competence.⁹⁵ Autonomy encompasses the experience of being causal, of being able to organize one’s own actions in an effort to affect the world.⁹⁶ Relatedness includes the desire to connect to others in relationships of care and to be treated as a respected member of salient social groups.⁹⁷ Competence concerns one’s “predisposition to control the environment

⁸⁸ See *id.* at 1686.

⁸⁹ See TASLITZ, RAPE AND CULTURE, *supra* note 82, at 134–51.

⁹⁰ See JOHN S. DRYZEK, DELIBERATIVE DEMOCRACY AND BEYOND: LIBERALS, CRITICS, CONTESTATIONS 13 (2002).

⁹¹ See *id.* at 13; Andrew E. Taslitz, *Temporal Adversarialism, Criminal Justice, and the Rehnquist Court: The Sluggish Life of Political Factfinding*, 94 GEO. L.J. 1589, 1604–05 (2006).

⁹² DRYZEK, *supra* note 90, at 1–2; AMY GUTMANN & DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY? 12–13 (2004) (“For rights only have real force if they are given reflective acceptance by the citizens who both take advantage of these rights for themselves and respect these rights as held by others.”); See also GUTMANN & THOMPSON, at 3–4.

⁹³ Cf. W. BRADLEY WENDEL, LAWYERS AND FIDELITY TO LAW 130 (2010).

⁹⁴ BRUNO S. FREY, HAPPINESS: A REVOLUTION IN ECONOMICS 107 (2008).

⁹⁵ See *id.* at 109.

⁹⁶ See *id.*

⁹⁷ See *id.*; DANIEL MARKOVITZ, A MODERN LEGAL ETHICS: ADVERSARY ADVOCACY IN A DEMOCRATIC AGE (2008) (arguing that the legitimacy of a legal system requires a political process in which there is broadly shared collective participation in creating law; it is this shared participation that turns competing selfish individuals into public-regarding

and to experience oneself as capable and effective.”⁹⁸

Voice is therefore important because it promotes a sense of autonomy, relatedness, and competence.⁹⁹ To achieve this result, “effective voice” is required, that is, a voice perceived as having the real prospect of at least sometimes changing outcomes.¹⁰⁰ Ineffective voice conveys the sense of empty ritual, of not really being “listened to.”¹⁰¹ Effective voice, on the other hand, addresses relatedness too because such voice “is an important signal about one’s standing in a group.”¹⁰² Individuals involved in arbitrations, mediations, civil or criminal trials, or other dispute resolution mechanisms that give them a chance to speak their minds are far more likely to accept negative outcomes as legitimate.¹⁰³ They are also far more likely to respect and obey the law in the future.¹⁰⁴ On a broader scale, more democratic institutions achieve similar results in the political realm because they enhance individuals’ perceptions of autonomy.¹⁰⁵

In the case of a criminal defendant alleging breach of his Fourth Amendment protections, effective voice requires at least the prospect of exclusion, for only that prospect creates the real possibility of a decision that can alter the outcome. If the exclusionary rule does not exist, this prospect is gone. With it is gone the sense of legitimacy that law requires.¹⁰⁶

4. Summing Up

In sum, therefore, Justice Clark was right when he stated the following in *Mapp v. Ohio*,¹⁰⁷ the seminal case holding that the exclusionary rule applied to the states:

Since the Fourth Amendment’s right of privacy has been declared enforceable against the States through the Due Process Clause of the

citizens, the law that results from struggle thus truly being the product of the political community).

⁹⁸ FREY, *supra* note 94, at 109. Procedural justice meted out by relevant institutions also promotes a positive sense of self. *See id.*

⁹⁹ *See id.* at 110.

¹⁰⁰ *See* TASLITZ, RAPE AND CULTURE, *supra* note 82, at 137–41.

¹⁰¹ *See id.*

¹⁰² *See* FREY, *supra* note 94, at 110.

¹⁰³ *See id.*; Harris, *Accountability-Based Policing*, *supra* note 6, at 161–64 (discussing empirical literature applying this principle to police legitimacy); SCHULHOFER, *supra* note 45, at 69 (similar, specifically addressing how the exclusionary rule promotes legitimacy).

¹⁰⁴ *See* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 161–78 (2006).

¹⁰⁵ *See* FREY, *supra* note 94, at 113.

¹⁰⁶ *Cf. infra* text accompanying notes 341–95 (analyzing public perceptions of legitimacy and the exclusionary rule, albeit from a different perspective than voice).

¹⁰⁷ 367 U.S. 643 (1961).

Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government. Were it otherwise, then just as without the [exclusionary] rule the assurance against unreasonable federal searches and seizures would be “a form of words”, valueless and undeserving of mention in a perpetual charter of inestimable human liberties, so too, without that rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court’s high regard as a freedom “implicit in the concept of ordered liberty.”¹⁰⁸

Absent suppression, explained the Justice, the Constitution would “grant the right but in reality . . . withhold its privilege and enjoyment.”¹⁰⁹ Because a right without a remedy is no right at all, when a court says otherwise it engages in an act of hypocrisy—doing one thing while saying another—and that has pernicious social consequences.

III. JUDICIAL HYPOCRISY

Understanding why judicial hypocrisy causes ill consequences first requires exploring the nature and dangers of hypocrisy more generally, then turning to hypocrisy in the courts. That exploration reveals that judicial hypocrisy masks political power, aiding a cynical manipulation of the public, while shielding the courts from accountability for the true reasons for their actions.

A. Hypocrisy’s Nature

Hypocrisy can be both inner and outward, that is, respectively pretending to yourself and to others that you are morally better than you are.¹¹⁰ Hypocrisy enables us to engage in acts against our own better moral judgment.¹¹¹ Hypocrisy also insults others by falsely elevating ourselves as if we were above their moral station, while inflicting upon them the very moral wrongs that we claim to despise.¹¹² Hypocrisy is rooted in human anxiety about status—our sense of the value that others assign to us as individuals—which is closely linked to our sense

¹⁰⁸ *Id.* at 655. Clark’s words here are, however, placed in the context of his entire opinion, arguably more ambiguous than I have used them here about whether the Fourth Amendment, *standing on its own*, incorporates the exclusionary rule against the states as a matter of constitutional law inherent in the logic of the amendment and of individual constitutional rights. See MACLIN, *supra* note 1, at 173–84. His quote is apt, however, for my purposes, and I see no need to explore the matter further here.

¹⁰⁹ *Mapp*, 367 U.S. at 656.

¹¹⁰ See MIKE W. MARTIN, SELF-DECEPTION AND MORALITY 44–45 (1986).

¹¹¹ See *id.* at 45–52.

¹¹² See *id.* at 45.

of equality. A Middle Ages peasant would likely not be insulted by the haughtiness of a noble.¹¹³ But the more we see others as our equals, the more anxiety we have about their purported elevation of status.¹¹⁴ If someone is revealed to us as a hypocrite, we see him for what he is—our equal or our inferior—and not for the superior that he pretends to be. When he nevertheless acts *as if* he is our superior, he treats us as having lower status when we know that not to be true, and we therefore feel insulted.¹¹⁵

We also may be offended by the hypocrite, because we recognize that his false pose of virtue marks him as a repeat-offender of vice. Law professor William Ian Miller explains:

The glutton and the lecher may self-servingly think their abstinence is virtuous; they may sincerely believe themselves to be turning over new leaves, but by the time they are turning over the hundredth new leaf surely they must know that their attempts at virtue are only so much foreplay to their vice, an enhancing of its deliciousness.¹¹⁶

Observers who spot another's hypocrisy may further be offended because it involves either the actual or attempted collection of a social benefit (status) that is undeserved, that is, for which no necessary price has been paid.¹¹⁷ "Hypocrisy is a parasite, operating by mimicking the attractiveness of virtue, appropriating its rewards."¹¹⁸

Many religious cultures repudiate hypocrisy.¹¹⁹ Jesus especially condemned this sort of hypocrisy in which one blames others when he is blameworthy himself.¹²⁰ Thus, Jesus said:

How can you say to your brother, "Let me take the speck out of your eye," when all the time there is a plank in your own eye? You hypocrite, first take the plank out of your own eye, and then you will see clearly to remove the speck from your brother's eye.¹²¹

Jesus condemns, according to Professor Miller, the *unconscious* cognitive bias

¹¹³ See ALAIN DE BOTTON, STATUS ANXIETY 25–44 (2004).

¹¹⁴ See *id.* at 26.

¹¹⁵ See WILLIAM IAN MILLER, FAKING IT 20 (2003).

¹¹⁶ *Id.*

¹¹⁷ See *id.*

¹¹⁸ See *id.*

¹¹⁹ See D. JASON SLONE, THEOLOGICAL INCORRECTNESS: WHY RELIGIOUS PEOPLE BELIEVE WHAT THEY SHOULDN'T 4 (2004).

¹²⁰ See MILLER, *supra* note 115, at 1.

¹²¹ Matthew 7:4–5.

(the plank) that obscures one's conscious vision of the truth.¹²² The plank saves an individual from the anxiety of realizing that he is feigning his superiority over others.¹²³ Partiality to oneself thus interferes with one's assessment of others¹²⁴: "You fall victim to a false but sincere belief that you are seeing the world objectively and seeing it whole."¹²⁵ But, says Miller:

It is not even clear that . . . conscious hypocrisy is morally worse than the mote/beam situation of merely being blind to one's own faults. Take the ever-present anxiety regarding racism and accusations of it. Is the person who fears that deep down she might be a racist [but prefers not to chastise herself in public where her self-blame may be read as self-serving fakery], and [who] aggressively blames others for their racism, worse than the person who does not know he is one and blames others for theirs?¹²⁶

Miller's answer to his own question is "no." The conscious hypocrite hates racism in herself and in others and so is faking nothing. But the unconscious hypocrite is a fraud whose double lies—to herself and to others—make it even less likely that she will do the right thing and more likely that she will denigrate those around her.¹²⁷

B. *The Judge as Political Hypocrite*

1. Why Ending the Exclusionary Rule is Judicial Hypocrisy

A judge who claims that an individual's Fourth Amendment rights have been violated but who denies the claimant any effective remedy is thus a hypocrite whether the judge realizes it or not. He says one thing while doing another—the commonsense definition of hypocrisy¹²⁸—because, as argued above, a right without a remedy is no right at all. He also pretends to a virtue, namely integrity (roughly speaking, acting consistently with the moral principles required by his institutional role), that he lacks.¹²⁹ He admits to being bound by the Constitution and to finding it violated, thus holding himself up as the moral guardian of our

¹²² See MILLER, *supra* note 115, at 13–14.

¹²³ See *id.* at 14.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 15.

¹²⁷ See *id.* at 15–16.

¹²⁸ See DOUGLAS WALTON, CHARACTER EVIDENCE: AN ABDUCTIVE THEORY 95 (2006).

¹²⁹ See *infra* text accompanying notes 205–83 (defining "integrity").

rights, when he in fact is abdicating his role. Whether because of ideology,¹³⁰ motivated reasoning¹³¹ (such as it being in his self-interest not to look “soft on crime,” thus aiding, for state court judges, re-election chances¹³²), or some other cause, his conscious belief that he does right is no better. Indeed, it can be worse because the self-deceived judge is not even aware of a conflict or tension to be resolved. He is, therefore, less likely even to consider doing so.¹³³

But why should judges even pretend that a right, such as one rooted in the Fourth Amendment, exists or has been violated? The judge serves a political function, though in a different way than legislators or executives.¹³⁴ Judges are supposed to interpret and apply the law fairly and equally, regardless of partisan sentiments or personal preferences.¹³⁵ That is part of what maintains their

¹³⁰ Andrew E. Taslitz, *Patriarchal Stories I: Cultural Rape Narratives in the Courtroom*, 5 S. CAL. REV. L. & WOMEN'S STUD. 387, 404–10 (1996) (defining “ideology”).

¹³¹ MICHAEL KAPLAN & ELLEN KAPLAN, BOZO SAPIENS: WHY TO ERR IS HUMAN 134–36 (2009) (defining “motivated reasoning” as reasoning motivated, often unconsciously so, by the desire to achieve certain outcomes, thus sometimes resulting in cognitive distortions from self-interest).

¹³² See, e.g., Paul Brace & Brendt D. Boyea, *Judicial Selection Methods and Capital Punishment in the American States*, in RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS 186 (Matthew J. Streb ed., 2007) (concluding that the prospect of elections does affect judges’ decisions in capital punishment cases). But see CHRIS W. BONNEAU & MELINDA GANN HALL, IN DEFENSE OF JUDICIAL ELECTIONS (2009) (arguing more generally that judicial elections are desirable).

¹³³ MILLER, *supra* note 115, at 15–16 (arguing that unconscious hypocrites are worse than conscious ones because they are less likely to make efforts to correct their hypocrisy).

¹³⁴ There are numerous political functions that a judge might serve, such as furthering the “separation of powers” or, in some instances (despite some social scientists’ skepticism on the point), protecting minority rights against certain oppressive majorities. See, e.g., Lynch, *supra* note 12, at 727, 740 (applying the separation of powers argument to the exclusionary rule); HALL, *supra* note 61, at 5 (arguing that under certain conditions the Court can effect change protective of individual rights regardless of majority views). But such functions do *not* include acting precisely like elected representatives to a legislature.

¹³⁵ See Keith J. Bybee, *Introduction: The Two Faces of Judicial Power*, in BENCH PRESS: THE COLLISION OF COURTS, POLITICS, AND THE MEDIA 1, 4–5 (Keith Bybee ed., 2007) (arguing that, while the empirical data shows a widespread belief that politics, including partisanship, plays a role in judging, large majorities “believe that the courts are special venues in which political pressure and partisan squabbling have no place,” and these same majorities overwhelmingly support judicial independence, for “most Americans do not think the rule of law is simply the rule of men.”). Can judges in fact decide on grounds other than ideology, partisanship, or personal preferences? My answer is “yes,” albeit within some limits. Here I rely in part on the work of political scientist Eileen Braman, who agrees that motivated reasoning plays a role in judicial decision making. See EILEEN BRAMAN, LAW, POLITICS & PERCEPTION: HOW POLICY PREFERENCES INFLUENCE LEGAL REASONING 7 (2009). But she explains the limited nature of this role:

legitimacy.¹³⁶ Such legitimacy is required in the first place because judges' decisions affect the distribution of political, economic, and social power.¹³⁷ Moreover, elected judges have some of the same incentives as other elected officials.¹³⁸ But, once elected, it is laws, rules, and principles that are meant to

I challenge the dominant assumption in social science literature that judges are primarily motivated by policy. In line with Baum's . . . conception of mixed goals in judicial decision making, I offer an alternative characterization of motives based on the idea that those who are trained in the legal tradition come to internalize legal norms and "accuracy" goals consistent with idealized notions of decision making. The theory allows for the possibility, however, that "directional" (policy) goals may influence legal reasoning processes. Significantly, I suggest that objective case facts and norms of appropriate behavior can serve as a constraint on the ability of accuracy-seeking decision makers to reach directional conclusions consistent with their personal preferences.

Id. But see Charles Gardner Geyh, *Introduction, So What Does Law Have to Do with It?*, in *WHAT'S LAW GOT TO DO WITH IT?: WHAT JUDGES DO, WHY THEY DO IT, AND WHAT'S AT STAKE* 1, 7–8 (Charles Gardner Geyh ed., 2011) [hereinafter *WHAT'S LAW GOT TO DO WITH IT?*] (arguing that the modern consensus is indeed that law plays a role in judicial decision making but that there is no consensus on how much of a role).

¹³⁶ Empiricist Tom S. Clark explains:

[A] first principle for the Supreme Court is the maintenance of judicial legitimacy, which in part consists of the maintenance of the image of the courts as apolitical, legal institutions. The courts' legitimacy as unelected, unaccountable actors with a constitutional veto hinges on the perception that their decisions are made in light of neutral legal arguments. Judgments about public policy based on ideology or politics from the courts might reasonably be considered illegitimate from a democratic theory perspective, because democracy requires that policy decisions be made by accountable representatives. The loss of public support—judicial legitimacy—undermines courts' capacity to enforce constitutional limits on government, among other things.

TOM S. CLARK, *THE LIMITS OF JUDICIAL INDEPENDENCE* 21 (2011). But, notes Clark, the Court nevertheless acts with restraint where it perceives that further action will erode institutional legitimacy in the eyes of the public and, in that sense, is political. See *id.* at 21–22.

¹³⁷ See EMILY M. CALHOUN, *LOSING TWICE: HARMS OF INDIFFERENCE IN THE SUPREME COURT* 4 (2011) (noting the impact that Supreme Court decisions can have on the material and psychic resources of racial group members as one example of the impact on the power of non-party "constitutional stakeholders").

¹³⁸ See Matthew Streb, *How Judicial Elections Are Like Other Elections and What That Means for the Rule of Law*, in *WHAT'S LAW GOT TO DO WITH IT?*, *supra* note 135, at 195, 195–215 (surveying many of the ways in which judicial elections are and are not like other political election contests); Melinda Gann Hall, *On the Cataclysm of Judicial Elections and Other Popular Antidemocratic Myths*, in *WHAT'S LAW GOT TO DO WITH IT?*, *supra* note 135, at 223, 223–42 (arguing that judicial elections promote judicial accountability and other democratic values); David Pozen, *Are Judicial Elections*

guide their actions.¹³⁹ A judge therefore cannot openly ignore an authoritative text, like the Fourth Amendment. Furthermore, acknowledging its existence and that it is sometimes violated in specific cases invokes an appeal to a moral-political principle central to American identity.¹⁴⁰ Yet she claims that this same principle prevents her from providing a remedy generally, or at least in this case, under the Fourth Amendment in the form of the exclusionary rule. Her hands are tied. She can thus have her cake and eat it too. Restated, she appeals to principle in a way meant to make her seem like a virtuous judge, thus to garner support for her decision, when she is in fact lacking such virtue.¹⁴¹

2. The Harms Done by Judicial Hypocrisy

i. Masking Political Power

The injury done to a republican-democratic state that disrespects its entire citizenry by attempting to look like it is actively solving a politically-salient problem when it is cynically doing no such thing is inconsistent with sound republican government.¹⁴² The political actor, here, the judge, is portraying one

Democracy-Enhancing?, in WHAT'S LAW GOT TO DO WITH IT?, *supra* note 135, at 248, 248–73 (arguing that the democracy-damaging cons of judicial elections outweigh the democracy-enhancing pros).

¹³⁹ See KEITH BYBEE, ALL JUDGES ARE POLITICAL—EXCEPT WHEN THEY ARE NOT: ACCEPTABLE HYPOCRISIES AND THE RULE OF LAW 1–4 (2010) (arguing that the data shows both that citizens see the judicial process as infused with politics yet simultaneously believe that “judicial decisions are determined on nonpolitical, purely legal grounds,” at least after election or appointment). But see JAMES L. GIBSON, ELECTING JUDGES: THE SURPRISING EFFECTS OF CAMPAIGNING ON JUDICIAL LEGITIMACY 130–31 (2012) (arguing that, on balance, judicial elections do not harm courts’ legitimacy because citizens understand that deciding cases partly involves policymaking, so they want to know judges’ policy preferences). Gibson’s approval of a nakedly political electoral role for judges, and Bybee’s report of mixed public views, might lead some, and do lead Bybee, to endorse a degree of judicial hypocrisy, a view I challenge shortly. See *infra* text accompanying notes 183–204.

¹⁴⁰ See Thomas P. Crocker, *Presidential Power and Constitutional Responsibility*, 52 B.C. L. REV. 1551, 1624 (2011) (“Constitutional commitments work not because they are entrenched against change, but because they constitute a way of inhabiting institutions and social practices. In turn, these institutions and social practices imbued with constitutional commitments form the political community’s identity over time.”).

¹⁴¹ Cf. RUTH W. GRANT, HYPOCRISY AND INTEGRITY: MACHIAVELLI, ROUSSEAU, AND THE ETHICS OF POLITICS 2–3 (1997) (arguing that this sort of hypocrisy is unavoidable in elected legislators and executive branch members because the people need to believe moral-political principles matter to motivate them, even when political self-interest is at work).

¹⁴² See, e.g., DAVID RUNCIMAN, POLITICAL HYPOCRISY: THE MASK OF POWER FROM HOBBS TO ORWELL AND BEYOND 1 (2008) (making similar, but not identical, argument);

thing as if it is another, creating a kind of false impression or mask.¹⁴³ Although not all lies are acts of hypocrisy, lies made by those with a (pretended) commitment to upholding meaningful discourse rise to the level of hypocrisy.¹⁴⁴ Hypocrisy thus misrepresents an essential aspect of the self or of the institution.¹⁴⁵ Political hypocrisy occurs when it partially or completely masks political power.¹⁴⁶ Explains political theorist David Runciman, "Bentham believed that one of the tests of the justice of a political act was whether public opinion would stand for it, because public opinion was expressive of the widest possible set of interests."¹⁴⁷ But when political hypocrisy masks who is exercising power—when, why, how, and for what purposes they are doing so—public opinion is misled and no longer serves as a measure of justice.¹⁴⁸

That judicial decisions under the Fourth Amendment affect the distribution of political power cannot seriously be disputed, as I and others have argued elsewhere.¹⁴⁹ Patterns of searches and seizures can promote racial disparities in the reach of the criminal justice system,¹⁵⁰ mute the political voice of the poor, and silence dissenters.¹⁵¹ They can humiliate individuals and groups,¹⁵² foster crime as well as help to stop it,¹⁵³ undercut legitimate business activities,¹⁵⁴ and chill free speech more generally.¹⁵⁵ The political nature of Fourth Amendment rights is no modern insight. It was a point fully grasped by the Founders and the Reconstruction-era Republicans.¹⁵⁶ It was a key motivator for the Fourth

Sara Sun Beale, *Federalizing Hate Crimes: Symbolic Politics, Expressive Law, or Tool for Criminal Enforcement?*, 80 B.U. L. REV. 1227, 1266–80 (2000) (discussing social benefits and dangers of purely symbolic legislation promising to right a wrong without a hope of actually doing so).

¹⁴³ See RUNCIMAN, *supra* note 142, at 9–10.

¹⁴⁴ See *id.* at 130–31 (making similar points building on a reading of the work of Jeremy Bentham).

¹⁴⁵ See *id.*

¹⁴⁶ See *id.* at 134.

¹⁴⁷ *Id.* at 136.

¹⁴⁸ See *id.*

¹⁴⁹ See ANDREW E. TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF SEARCH AND SEIZURE, 1789–1868 3–4, 9–11 (2006) [hereinafter TASLITZ, RECONSTRUCTING].

¹⁵⁰ See, e.g., DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK 223 (2003) (documenting such disparities).

¹⁵¹ See Taslitz, *Fourth Amendment Federalism*, *supra* note 62, at 279–81.

¹⁵² See generally Andrew E. Taslitz, *Stories of Fourth Amendment Disrespect: From Elian to the Internment*, 70 FORDHAM L. REV. 2257 (2002) (illustrating such humiliation).

¹⁵³ See SCHULHOFER, *supra* note 45, at 69.

¹⁵⁴ See *Statement of Principles*, RIGHT ON CRIME, <http://www.rightoncrime.com/the-conservative-case-for-reform/statement-of-principles/> (last visited July 29, 2012).

¹⁵⁵ See TASLITZ, RECONSTRUCTING, *supra* note 149, at 22–23, 71, 89, 147, 203–04, 207, 226–29, 257; SCHULHOFER, *supra* note 45, at 13–14, 137, 153, 179.

¹⁵⁶ See TASLITZ, RECONSTRUCTING, *supra* note 149, at 3–6, 17–44, 91–94.

Amendment being in the Constitution in the first place.¹⁵⁷ When judges refuse to allow for the venting of frustration by individuals and groups with members of law enforcement perceived to have invaded constitutional search and seizure rights, those judges routinely allow the political status quo to stand. Yet courts exist in part, at least in theory, to allow aggrieved citizens to challenge that status quo where it violates constitutional principle. Judicial inaction in the face of potential constitutional abuse—as would occur absent the exclusionary rule—thus passively masks the state’s exercise of political power over disempowered individuals and groups.

ii. Shielding Judges from Accountability

Political hypocrisy, when it succeeds, also serves another evil: shielding judges from political accountability.¹⁵⁸ Modern democracies at least publicly adhere to the idea of every citizen having an equal voice in public fora.¹⁵⁹ Democracies also claim to favor political candor to promote fully-informed, accurate deliberation in making political choices.¹⁶⁰ They thus loathe hypocrisy because it involves secret, and therefore suspect, decision making.¹⁶¹ If the true decision or the true reasons for a decision are secret, the truth is not available for public criticism.¹⁶² Accountability fails, and the public becomes subject to

¹⁵⁷ See *id.* at 42–44; cf. SCHULHOFER, *supra* note 45, at 23 (“The American Revolution was itself in no small measure a product of impassioned struggles over search and seizure that came to a head in the 1760s.”).

¹⁵⁸ See Andrew E. Taslitz, *Police Are People Too: Cognitive Obstacles to, and Opportunities for, Police Getting the Individualized Suspicion Judgment Right*, 8 OHIO ST. J. CRIM. L. 7, 51–54, 64–67 (2010) [hereinafter Taslitz, *Police Are People Too*] (discussing the dangers of non-accountability generally).

¹⁵⁹ See Fred O. Smith, Jr., *Awakening The People’s Giant: Sovereign Immunity and the Constitution’s Republican Commitment*, 80 FORDHAM L. REV. 1941, 1972 (2012) (“Short of that extreme, unreasonably denying a group of people a full and equal public voice is often tantamount to an aristocratic cabal, for it places power in the hands of a few at the expense of the many.”); Ronald C. Den Otter, *Democracy, Not Deference: An Egalitarian Theory of Judicial Review*, 91 KY. L.J. 615, 654 (2002–2003) (“[P]olitical equality lies at the core of our democratic ideal, and . . . any society denying a competent person an equal voice in public affairs is not a democracy at all.”).

¹⁶⁰ See Andrew E. Taslitz, *Eyewitness Identification, Democratic Deliberation, and the Politics of Science*, 4 CARDOZO PUB. L. POL’Y, & ETHICS J. 271, 284 (2006) [hereinafter Taslitz, *Democratic Deliberation*] (discussing error-correction from governmental transparency); JEFFREY EDWARD GREEN, *THE EYES OF THE PEOPLE: DEMOCRACY IN AN AGE OF SPECTATORSHIP* 179–82 (2009) (defending democratic candor).

¹⁶¹ See *infra* text accompanying notes 261–70.

¹⁶² See Taslitz, *Democratic Deliberation*, *supra* note 160, at 284.

manipulation by cynical leaders.¹⁶³ For the high priests and priestesses (our judiciary) of constitutional principle to engage in such manipulation is particularly reprehensible because judges are theoretically, and, in the eyes of the citizenry, expected to justify their decisions publicly, in detail, and in the language of law, rules, and principles, not raw power or ideology.¹⁶⁴ Providing a Fourth Amendment right without a Fourth Amendment remedy is subject to these very charges of inequality, cynicism, secrecy, and non-accountability because the courts are freed from the necessity of justifying their apparent complicity in a constitutional violation by the police.¹⁶⁵

¹⁶³ See Andrew E. Taslitz, *The Criminal Republic: Democratic Breakdown as a Cause of Mass Incarceration*, 9 OHIO ST. J. CRIM. L. 133, 173–78, 185–87 (2011) [hereinafter Taslitz, *Criminal Republic*] (explaining why relying on surveys or other quick, uninformed measures of public opinion renders policy that results more from cynical manipulation of the public by powerful interests than on the more informed, deliberative, case-specific measures, such as those found in “democratic social science,” that reflect the true, informed, most trustworthy guide to the “will of the People”).

¹⁶⁴ See Christopher Engel, *The Psychological Case for Obliging Judges to Write Reasons*, in THE IMPACT OF COURT PROCEDURE ON THE PSYCHOLOGY OF JUDICIAL DECISION MAKING 71, 75–78 (Christopher Engel and Fritz Strack eds., 2007). Engel argues that, even given the teachings of cognitive science about the workings of the subconscious mind, requiring judges to give reasons justifying their actions is feasible and serves at least nine purposes: first, it disciplines the judge to explain the consistency of outcome with sources of legal authority—which are not infinitely malleable; second, it clarifies the meaning of the result; third, it allows for calming the concerns of the diverse audiences in a normatively complex world; fourth, it permits reasoned discipline of lower courts by higher ones; fifth, it helps ordinary persons understand the outcomes; sixth, it reminds the parties that they are citizens obliged to obey the rule of law; seventh, it tries to persuade legal professionals; eighth, it promotes legitimacy among the public at large; and ninth, it helps the legal community advance law’s evolution. See *id.*

¹⁶⁵ The most convincing defense I have seen of the need for complete, thorough judicial truthfulness and candor is articulated by Professor Emily Calhoun. See CALHOUN, *supra* note 137, at 48–49. Calhoun recognizes that different perceivers might disagree about whether particular opinions are candid and truthful or not. See *id.* at 49. But candor at least requires opinions that take seriously the “values and interests identified as important by constitutional losers . . .” *Id.* Indeed, “untruthful judicial opinions send a message that constitutional losers do not count as people to whom justices are responsible.” *Id.* at 50. Such opinions thus “fail to satisfy the expectation that the consent of all citizens of full constitutional stature matters to the legitimacy of judicial review and constitutional meaning.” *Id.* Indeed, Calhoun persuasively argues that judges must openly recognize the harms their decisions inflict on losers and honor the losers’ worth and the importance of their claims if judicial legitimacy is not to be harmed. See *id.* at 59–78.

3. Rebutting the Argument That Hypocrisy Is Inevitable and Desirable

i. Courts Are Not Legislatures or Executives

At least one modern philosopher—Ruth Grant—has argued that politicians' saying one thing while believing or doing another is not always reprehensible.¹⁶⁶ The argument is that because appeal to moral principles is essential to gaining public support for programs, the language of principle *must* be used. But nothing can be done in the world of compromise politics with purity.¹⁶⁷ Getting the votes of other politicians and forming coalitions requires hypocritical lies because that is the only way to get the support of powerful others and of much of the public.¹⁶⁸ Some compromises and lies are too egregious to even be marginally serving principle.¹⁶⁹ Other lies, however, serve important principles to some significant extent.¹⁷⁰ Such lies are thus not morally condemnable.¹⁷¹

But Grant wrote of legislative and executive politics by elected officials in those branches.¹⁷² Though some compromise likely necessarily occurs in many multi-judge panels, logrolling and similar sorts of trades are not supposed to exist in the same form or with the same force in the judiciary.¹⁷³ Moreover, most

¹⁶⁶ See GRANT, *supra* note 141, at 18.

¹⁶⁷ See *id.* at 2–3, 18, 20–21, 25–26, 49.

¹⁶⁸ See *id.* at 44–45, 49–50.

¹⁶⁹ Hitler's endorsement of the idea of the "big lie" as being necessary to gaining public support and the lies he told to advance the "Final Solution" come to mind as extreme but clear examples. See JAMES J. BARNES & PATIENCE P. BARNES, *HITLER'S MEIN KAMPF IN BRITAIN AND AMERICA: A PUBLISHING HISTORY 1930–39* 40 (1980); HENRY FRIEDLANDER, *THE NAZI GENOCIDE: FROM EUTHANASIA TO THE FINAL SOLUTION* (1997).

¹⁷⁰ See BARNES & BARNES, *supra* note 169; FRIEDLANDER, *supra* note 169. GRANT, *supra* note 141, at 35–36.

¹⁷¹ See BARNES & BARNES, *supra* note 169; FRIEDLANDER, *supra* note 169.

¹⁷² There is no significant reference to courts anywhere in Grant's book, and she repeatedly talks about the importance of relationships of political "dependency" in ways that smack of electoral, executive, and legislative politics, though courts certainly have a more attenuated form of dependence on the public and vice-versa. See GRANT, *supra* note 141, at 13, 17, 21–22, 37–38, 55–56, 151–52, 162–68 (discussing relationships of dependency); *infra* notes 175–79 and accompanying text (on public perceptions).

¹⁷³ See, e.g., BARNES, *supra* note 169, at 40 (2008) (arguing that "panel effects," in which the mere presence of one ideological opponent in a three-judge panel moderates the two-judge ideological majority's views, are explained by a combination of defused group-polarization from hearing varied views, dissent-aversion, limits of preference-intensity, and a limited knowledge base, but that is very different from some sort of quid-pro-quo exchange). But Posner does note that "a judge might be political in a sense divorced from policy: he might, like a legislator, use charm, guile, vote trading, and flattery to induce other judges to go along with him, though his aim might be to produce legalistic decisions. (He thus might be what is called in a variety of nonpolitical settings a 'good politician.')." See, e.g., RICHARD A. POSNER, *HOW JUDGES THINK*, 10, 30–35 (2008).

judicial decisions, especially at the trial level, are made by one judge alone.¹⁷⁴ There are nevertheless important limitations on the judiciary's freedom to pursue principle at any cost.¹⁷⁵ But in the constitutional arena—since such decisions cannot be legislatively overruled—judges may arguably have less reason to fear limitations imposed by other branches.¹⁷⁶ The main constraint is likely public opinion.¹⁷⁷ Empirical data suggests, of course, that a variety of other institutional factors, ideologies, and personality traits affect judicial decisions.¹⁷⁸ But judges are not entirely unconstrained by law, perhaps far more constrained than is true of legislatures.¹⁷⁹

More importantly, whatever constraints judges do face, because they do not have to engage in log-rolling and other tit-for-tat sorts of compromise in quite the same way that govern in legislatures, judges do not have to be hypocrites to serve the Constitution and the role it requires of them. Rather than pretending to recognize breach of a constitutional right but *de facto* doing no such thing by failing to provide a real remedy, they should either provide the remedy or admit that there really is no right. The latter approach would require them to explain their reasons, thus subjecting them to public criticism, instead of hiding the truth under hypocritical lies and manipulations.¹⁸⁰ That might help to defeat their

¹⁷⁴ See POSNER, *supra* note 173, at 74 (discussing the relationship between “the” trial judge and the appellate courts).

¹⁷⁵ See, e.g., CLARK, *supra* note 136, at 21 (analyzing the role of public perceptions of judicial legitimacy as a limit on the judiciary); HALL, *supra* note 61, at 4–5 (arguing that the Court's decisions can be successfully implemented in the face of popular opposition but primarily when the Court can rely on the lower courts rather than other branches to do the job).

¹⁷⁶ Less reason does not mean no reason, for example, fearing a legislative attempt to limit a court's jurisdiction over certain questions. See HALL, *supra* note 61, at 25–61 (reviewing the history of legislative efforts to curb the Court's jurisdiction).

¹⁷⁷ See CLARK, *supra* note 136, at 21.

¹⁷⁸ See generally POSNER, *supra* note 173 (analyzing the “internal” and “external” constraints on the judiciary).

¹⁷⁹ Judge Posner, who is cynical about the judiciary in some respects, nevertheless concludes that judges are constrained pragmatists, “boxed in . . . by norms that require of judges impartiality, awareness of the importance of the law's being predictable enough to guide the behavior of those subject to it (including judges!), and a due regard for the integrity of the written word in contracts and statutes.” *Id.* at 13. He concedes that the “box is not so small that it precludes his being a political judge, at least in a nonpartisan sense. But he need not be one unless ‘political’ is given the broadest of its possible meanings . . . , in which the ‘political’ is anything that has the slightest whiff of concern for policy.” *Id.*

¹⁸⁰ See Andrew E. Taslitz, *Interpretive Method and the Federal Rules of Evidence: A Call for a Politically Realistic Hermeneutics*, 32 HARV. J. ON LEGIS. 329, 399–401 (1995) (explaining the need for judicial candor).

personal or raw ideological long-run goals, but minimizing their influence is supposed to be what proper design of the judiciary as an institution is all about.¹⁸¹

Granted, if the United States Supreme Court mandates a system of legal hypocrisy, lower courts may have no choice but to mimic their judicial masters.¹⁸² But that just counsels cutting off judicial hypocrisy's hydra-heads—the hypocrisies of the majority of the Justices of the Supreme Court—so that the rest of the judicial body is less threatened by their presence.

ii. Courts Are Capable of Doing Better

Court analyst and political scientist Keith Bybee disagrees. Bybee sees judicial hypocrisy as, in some ways, a good thing, but, in any event, the best we can hope to accomplish.¹⁸³ Bybee's position is that judges unavoidably rely on ideology and politics in making decisions, even if they do so unconsciously.¹⁸⁴ Yet if they were candid about this, they would deteriorate into raw political actors like career politicians and would lose any semblance of public support. Judicial hypocrisy maintains the pretense of judicial neutrality under the rule of law, thus maintaining sound judicial aspirations and public perceptions of judicial legitimacy.¹⁸⁵ Such hypocrisy does little harm because the public knows judges are political actors yet simultaneously believes they can often act otherwise and should strive to do so.¹⁸⁶ The public is thus not entirely fooled, and a little self-deception by judges and their audience goes a long way toward making the whole system work.¹⁸⁷

¹⁸¹ *See id.*

¹⁸² *See* POSNER, *supra* note 173, at 39–40 (discussing the doctrine of precedent and its impact on lower courts).

¹⁸³ *See* BYBEE, *supra* note 139, at 4, 23.

¹⁸⁴ *See id.* at 30 (“[T]he tensions between law and politics in the judicial process are indeed genuine . . .”).

¹⁸⁵ *See id.* at 23–24.

¹⁸⁶ *See id.* at 30–31.

¹⁸⁷ *See id.* at 35–36; *but see* WILLIAM D. POPKIN, *EVOLUTION OF THE JUDICIAL OPINION* 126 (2007) (arguing for the benefits of judicial candor). Bybee's primary argument analogizes between common courtesy, which involves the hypocrisy of treating others with a status in which they may in fact not be regarded, and judging. *See* BYBEE, *supra* note 139, at 35–74. Without exploring this analogy in detail here, I think it sufficient to note that the far greater stakes in the judicial arena make the costs of hypocrisy much higher there than in the common situations of daily courtesies. Bybee also says that we grow to accept the hypocrisies of courtesy because we become habituated to it at an early age. *See id.* at 37. But if we have become habituated to judicial hypocrisy, that is a habit we should break. Bybee concedes that courteous hypocrisies often work to preserve existing class hierarchies. *See id.* at 37, 66–70. While I agree that law often does so too, that should not be embraced as either an acceptable goal of, or an unavoidable result of, judging. Bybee praises courtesy and law as using hypocrisy to paper over serious differences by shows of respect and neutrality, thus enabling numerous beneficial social

But Bybee is wrong. He makes the “fundamental attribution error”—the mistake of giving character (here, judicial character) too much weight (though it clearly matters) relative to situational influences in shaping behavior.¹⁸⁸ A group of leading cognitive psychologists make this point concerning United States Supreme Court Justices. These justices find themselves in circumstances that can enable judicial integrity. The judicial role, these theorists explain, requires the appearance of objectivity rooted in law.¹⁸⁹ But the process of judging exposes judges to multiple sides of an issue, with new information coming from the parties—information that can open judicial eyes:

Confronting theories, evidence, and differences in life experience that one would otherwise be inclined to miss, and that may challenge or perhaps contradict commonsense notions, is part of the daily job for judges. In case after case, lawyers present frameworks, conceptions, and information to test and dispute those offered by their opponents and to persuade the judge and jury. That process—in the words of Justice David J. Brewer, the “honest and actual antagonistic assertion of rights by one individual against another”—appears to have real effects.¹⁹⁰

Additionally, though it is easy to take positions on broad ideological matters in the abstract, being confronted with the concrete details of a specific case and the recognition that “suddenly, there’s a real person there,” can move the judicial heart and mind in unexpected directions.¹⁹¹ The Justices of the United States Supreme Court, moreover, being least constrained by precedent and most independent from other branches, and protected by lifetime tenure, have the luxury of relative independence.¹⁹² Furthermore, they must deliberate with eight other Justices of

interactions that would otherwise result in open conflict. *See id.* at 40–42. But too much hypocrisy in the arena of law produces what Marxists would call “false consciousness,” when law is often better used to open judges’ and others’ eyes to what they are missing and to permit at least evolutionary social change where needed. *But see id.* at 38, 68–71 (acknowledging the dangers of too much courtesy in the face of entrenched inequality, at least in the area of open partisan political conflict). Bybee, it should be noted, says that he is not so much analogizing between courtesy and law as using the former as a means to understand the latter, *see id.* at 48–50, but that seems to me a distinction without a difference.

¹⁸⁸ Burnele V. Powell, *The Limits of Integrity or Why Cabinets Have Locks*, 72 *FORDHAM L. REV.* 311, 329 (2003).

¹⁸⁹ *See* Jon D. Hanson & Adam Benforado, *The Drifters: Why the Supreme Court Makes Justices More Liberal*, *BOSTON REV.* 23, 24, Jan./Feb. 2006, <http://bostonreview.net/BR31.1/hansonbenforado.php>.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *See id.* at 26; CLARK, *supra* note 136, at 12–13 (summarizing some institutional sources of the Court’s independence, though drawing on the work of “attitudinal model”

often very different views, at least five of whom must come to agree on a common position, while faced with the weight of making some of the nation's most important decisions, receiving the best briefs, confronting the best oralists, and being aided by the sharpest of law clerks.¹⁹³ They also are confronted with the best and most complex intellectual criticism of their work, the public's most vocal reactions to the Court, and feedback from the more political branches. The result has often been that justices shift from their initial ideological positions and join in unexpected decisions along the way.¹⁹⁴

True, some Justices drift little, if at all, from expectations, but these Justices have social ties and previous experiences that have shaped them to be relatively less malleable and that maintain their ideological "backbone."¹⁹⁵ Furthermore, they may display personality traits, such as the heightened sense of threat and discomfort with ambiguity that characterizes many political conservatives, that lead them to resist change.¹⁹⁶ (It is here that judicial character most matters). Such judges will likewise adopt fairly inflexible judicial philosophies to support their natural penchants.¹⁹⁷ But this is but another way of saying that some Justices do not have the character needed to move significantly beyond the dictates of personal ideology, regardless of the resulting inconsistencies.¹⁹⁸

None of this means that judicial ideology does not have a profound influence as one important factor shaping evolving precedent.¹⁹⁹ But it does mean that proper institutional design and careful attention to judicial character in the appointments process can help move judges, including Supreme Court Justices, toward greater open-mindedness and consistency. Candor, to the best extent that judges are capable of it, should aid accountability in the face of criticism, including public reaction.²⁰⁰ Candor in judicial opinions also matters because what we say in

theorists, who often argue that judicial independence merely frees the justices to rely on their ideological or personal preferences in many instances).

¹⁹³ See Hanson & Benforado, *supra* note 189, at 26.

¹⁹⁴ See *id.*

¹⁹⁵ See *id.*

¹⁹⁶ See *id.*; Taslitz, *Status Quo Bias*, *supra* note 41, at 18–24 (discussing empirical data in support of this point).

¹⁹⁷ Hanson & Benforado, *supra* note 189, at 27–28.

¹⁹⁸ See *infra* text accompanying notes 256–59 (discussing role of character in judicial integrity).

¹⁹⁹ For one of the most extreme proponents of this viewpoint, arguing that Justices' personal ideological, though likely not their partisan, preferences dominate decision making, though seeing that as a good thing, see TERRI JENNINGS PERETTI, IN DEFENSE OF A POLITICAL COURT 3 (2001); see also MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS 91–20 (1981) (arguing that judges work to advance the claims of the currently governing group when they are appointed). But see RONALD A. CASS, THE RULE OF LAW IN AMERICA 19, 91–97 (2001) (arguing that "law" matters far more than many academics realize).

²⁰⁰ See POPKIN, *supra* note 187, at 126.

fact can shape how we think, feel, and act, even subconsciously.²⁰¹ Having as a societal aspiration that judges minimize hypocrisy is thus not either spitting into the wind or itself a case of hypocrisy. Rather, it sets up (within limits) an achievable goal. Rejecting the exclusionary rule is a particularly cognitively accessible case of hypocrisy for those willing to see it because it applies only where a judge or justices consciously declare the Fourth Amendment violated yet still choose to provide no real remedy. There is, therefore, a morally-condemnable degree of willful blindness in that anti-remedial decision.²⁰² Furthermore, as is addressed shortly, the contrary decision, namely to apply the exclusionary rule, will not undermine judicial legitimacy but, properly explained, should enhance it, *if* legitimacy is properly understood.²⁰³ Bybee's arguments notwithstanding, judges who declare Fourth Amendment rights without serious remedies are thus still hypocrites worthy of criticism. And hypocrisy is generally the very opposite of integrity.²⁰⁴

IV. JUDICIAL INTEGRITY

Integrity's nature must be examined before judicial integrity can be understood. Integrity requires a character committed to principled consistency, based on principles within the realm of what society considers morally acceptable. But such character can be proven only by testing it. It is tested by insisting that those claiming it candidly explain their principled reasons for action, facing resulting potential personal cost and the risk of criticism. Candor is also required because consistency must exist in fact *and* be seen as existing for integrity to be demonstrated.

The same holds true for judges. Rule of law concerns add to the demand for principled judicial consistency, and democratic concerns about popular acceptance heighten the need for judges' actions to be seen as institutionally legitimate because they are rooted in consistent principles. This section addresses each of these matters in turn, next explaining why the inconsistency between claiming a right's existence when it does not, as occurs with eliminating the exclusionary rule,

²⁰¹ See DAN AREIELY, *THE (HONEST) TRUTH ABOUT DISHONESTY: HOW WE LIE TO EVERYONE—ESPECIALLY OURSELVES* 81–82 (2012). Open reminders to be honest when administered right before or during a task also promote honest behavior. See *id.* at 43–46.

²⁰² See TIMOTHY D. WILSON, *STRANGERS TO OURSELVES: DISCOVERING THE ADAPTIVE UNCONSCIOUS* 20, 23, 35–40 (2002) (analyzing the cognitive bases of self-deception and its moral implications); ALFRED R. MELE, *SELF-DECEPTION UNMASKED* 13–18, 26 (Harry Frankfurt ed., 2001) (discussing the element of intention in subconsciously-motivated self-deception); DAVID LIVINGSTONE SMITH, *WHY WE LIE: THE EVOLUTIONARY ROOTS OF DECEPTION AND THE UNCONSCIOUS MIND* 110 (2004) (discussing cognitive biases that are the cause of self-deception, though the latter can have benefits in certain contexts too).

²⁰³ See *infra* text accompanying notes 341–95.

²⁰⁴ See WALTON, *supra* note 128, at 79.

prevents testing the judicial character or fostering proper public support for the judiciary. This section further discusses how the use of the moral language of integrity in fact makes the growth of such integrity more likely. Eliminating the exclusionary rule, this section continues, is a kind of corruption, making courts act in ways inconsistent with their nature *as courts*. The section ends by reviewing empirical research demonstrating that an informed public supports the exclusionary rule precisely because integrity demands it and that the rule further promotes judicial legitimacy by offering defendants the opportunity for effective voice via suppression hearings that procedural justice requires.

A. Integrity Defined: A First Cut

1. Integrity Requires Strength of Character, Purity, and Candor

Integrity requires a commitment to fundamental moral principles.²⁰⁵ That commitment is rooted in the idea that fundamental moral principles define individual identity.²⁰⁶ Each of us makes choices, at least as an adult, about right and wrong, about how to live a useful life, how to be a good person.²⁰⁷ These principles are central to our self-conception, our purported identity.²⁰⁸ These choices are not entirely unconstrained. Our upbringing, peers, culture, social roles, perhaps even our genes, all influence the principles we choose to live by.²⁰⁹ Nevertheless, we make choices, thereby helping to define and mold who we are.²¹⁰

Yet principles can conflict, making it hard consistently to live up to all of them.²¹¹ Moreover, we are what we do as much as what we think and say.²¹² Consequently, if our actions are inconsistent with our principles, or our principles inconsistent with one another, we fail truly to be who we think we are, to have a core nature that is neither fractured nor false.²¹³ Integrity therefore requires

²⁰⁵ See ALANSON MINKLER, INTEGRITY AND AGREEMENT: ECONOMICS WHEN PRINCIPLES ALSO MATTER 22–23 (2008).

²⁰⁶ See *id.*

²⁰⁷ See *id.* at 23–26.

²⁰⁸ See *id.*

²⁰⁹ See MINKLER, *supra* note 205, at 26–27; JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT 91–102 (2001).

²¹⁰ See R. A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 50 (2001); RUBENFELD, *supra* note 209, at 95–100.

²¹¹ Joshua E. Bowers, “*The Integrity Of The Game Is Everything*”: *The Problem Of Geographic Disparity In Three Strikes*, 76 N.Y.U. L. Rev. 1164, 1181 (2001) (arguing that law as integrity “demands that the sovereign state speak with a single voice. Therefore, integrity is violated by ‘internally conflicted laws’ or ‘checkerboard’ statutes. Laws lacking integrity express conflicting principles concurrently and thereby undermine coherence”).

²¹² See WILSON, *supra* note 202, at 203–16, 221.

²¹³ See MINKLER, *supra* note 205, at 23–24.

coherence among our principles, actions, motivations, other thoughts, and even our self-conception.²¹⁴

Such coherence is often referred to as a “wholeness of the person,” “harmony within oneself,” or “unity in moral considerations.”²¹⁵ Integrity is spoken of in neo-religious, near sacred terms, requiring purity among word, deed, intention, and self-conception.²¹⁶ Such purity is necessary to maintain a singular self, a personal narrative that coheres.²¹⁷ Modern psychology does teach that we are, in a sense, many-selved, a combination of numerous different cognitive and affective modules with specialized functions and no “homunculus” or “little man” controlling it all.²¹⁸ Nevertheless, we each strive to create a unified narrative, a consistent “self” out of the chaos.²¹⁹ Our moral systems likewise assume that there is such a thing as a coherent self, and that each individual self has its own character.²²⁰ Thinking and acting consistently with that self keeps us pure.²²¹ Inconsistencies leave us tainted, infected by thoughts or deeds not our own.²²² We become corrupted, invaded much like by physical disease, by alien emotions or actions that slowly eat away at our core self.²²³

Exercising integrity is often difficult. Determining what general principles require in a particular case is not easy.²²⁴ Time, effort, and talent are required to discern right from wrong in the individual case.²²⁵ But knowing what is right is not enough. Self-interest exercises a strong pull, and we may give in to self-deception to allay cognitive dissonance, convincing ourselves that we act consistently when we do not.²²⁶ Strength of character is therefore required to act in accordance with principle.²²⁷

²¹⁴ See *id.* at 24.

²¹⁵ See JONATHAN SOEHARNO, *THE INTEGRITY OF THE JUDGE: A PHILOSOPHICAL INQUIRY* 32 (2009).

²¹⁶ See *id.* at 32–33.

²¹⁷ See WALTON, *supra* note 128, at 95.

²¹⁸ See Andrew E. Taslitz, *Forgetting Freud: The Court's Fear of the Subconscious in Date Rape (and Other) Cases*, 17 B.U. PUB. INT. L.J. 145, 173 (2007) [hereinafter Taslitz, *Forgetting Freud*].

²¹⁹ Andrew E. Taslitz, *A Feminist Approach to Social Scientific Evidence: Foundations*, 5 MICH. J. GENDER & L. 1, 18–23, 34–36 (1998).

²²⁰ See Taslitz, *Forgetting Freud*, *supra* note 218, at 173; WALTON, *supra* note 128, at 81.

²²¹ See SOEHARNO, *supra* note 215, at 32–33.

²²² Cf. Taslitz, *Forgetting Freud*, *supra* note 218, at 161 (discussing the folk view of the subconscious in criminal cases as “infecting” the conscious mind, taking it away from “normality.”).

²²³ See *infra* text accompanying notes 325–40 (discussing corruption).

²²⁴ See WALTON, *supra* note 128, at 85.

²²⁵ See STEPHEN L. CARTER, (INTEGRITY) 10 (1996).

²²⁶ See MINKLER, *supra* note 205, at 38–39.

²²⁷ See *id.* at 38.

Yet the only way to test our strength of will is to act consistently with principle in the face of adversity, danger, or temptation.²²⁸ It is easy to do right when it costs you nothing. It is thus important to integrity to create the risk of such costs.²²⁹ Moreover, the difficulty of acting with integrity requires feedback to achieve error-correction.²³⁰ Saying what we do and why exposes us to the risk of criticism and the benefit of perhaps helping to avoid future mistakes.²³¹ Furthermore, the same action can possess or lack integrity depending upon the meaning you and others give to it.²³² Honestly explaining your actions helps to mold those meanings. Law professor Stephen Carter put the point this way:

[I]t does not promote integrity for one to cheat on taxes out of greed but to claim to be doing it as a protest unless one says openly (including to the Internal Revenue Service) that that is what one is doing. It does not promote integrity to ignore or cover up wrongdoing by a co-worker or family member. And it does not promote integrity to claim to be doing the will of God when one is actually doing what one's political agenda demands.²³³

2. Integrity Requires Being Seen as Consistent Based on Morally Acceptable Principles

Integrity has moral value in itself, and it can lead to good feelings about one's virtuous behavior.²³⁴ But minimizing the risk of self-deception and testing the accuracy of our self-description as virtuous via adversity, as just explained, means that the person of integrity must also care to be seen as such a person.²³⁵ Integrity

²²⁸ See *id.* at 52; WALTON, *supra* note 128, at 93.

²²⁹ See WALTON, *supra* note 128, at 79.

²³⁰ See MINKLER, *supra* note 205, at 38 (noting that errors in judgment can be a primary cause of incoherence); Taslitz, *Police Are People Too*, *supra* note 158, at 27, 57 (discussing the importance of feedback to improving performance).

²³¹ MINKLER, *supra* note 205, at 42–43 (arguing that empirical evidence demonstrates that reasons can often motivate decisions and not necessarily serve as mere rationalizations); Taslitz, *Police Are People Too*, *supra* note 158, at 65 (discussing the benefits of reason-giving accountability).

²³² See MINKLER, *supra* note 205, at 50.

²³³ CARTER, *supra* note 225, at 11.

²³⁴ See VIGEN GUROIAN, *TENDING THE HEART OF VIRTUE: HOW CLASSIC STORIES AWAKEN A CHILD'S MORAL IMAGINATION* 26–30 (1998) (arguing that fairy tales are of special value in teaching virtues because they enable children to associate moral conduct with good, and immoral conduct with bad, feelings).

²³⁵ Cf. WILSON, *supra* note 202, at 196–202 (discussing openness to how others perceive you as essential to getting accurate feedback needed to minimize self-deception).

thus has a social character.²³⁶ To strive to be seen as a person of integrity when you are not is, however, hypocrisy.²³⁷ This observation is especially true if you give up principles to serve conformity and please an audience.²³⁸ Integrity, therefore, sometimes requires breaking rules, as Martin Luther King did in encouraging and himself violating Jim Crow laws.²³⁹ It is not always possible to achieve perfect consistency.²⁴⁰ Integrity may come in degrees.²⁴¹ Nevertheless, a person of integrity struggles in good faith to achieve actions consistent with coherent personal principles while being correctly so viewed by others.

Integrity thus requires and is simultaneously a character trait or set of such traits.²⁴² But achieving consistency by strength of character is also insufficient. There is also an objective component of character.²⁴³ As one thinker put it, "In order to sell one's soul, one must have something to sell."²⁴⁴ There must at least be a culturally acceptable, morally defensible set of principles to which one adheres.²⁴⁵ To be consistent with evil principles would not merit praise as actions of integrity.²⁴⁶ If Hitler acted consistently in his condemnation and murder of the Jews, few Americans (outside the small circle of modern American Nazis) would say, "There went a man of integrity."²⁴⁷

²³⁶ See L. McFall, *Integrity*, 98 ETHICS 5, 11 (1987) (describing integrity as "a personal virtue with social strings attached").

²³⁷ See WALTON, *supra* note 128, at 95–96 (contemplating the process for determining whether this occurred in the case of Al Gore's speech to the Democratic national convention).

²³⁸ Acting for conformity's sake would be an instance of weakness of will, acting solely in one's narrow self-interest, and may also involve self-deception, all of which is inconsistent with integrity. See *supra* text accompanying notes 225–30; CARTER, *supra* note 225, at 10 ("[I]t is so much easier to follow the crowd On the campuses, too many students and not a few professors find it easier to go along with the latest trends than to risk the opprobrium of others by registering an objection.").

²³⁹ See MARSHALL FRADY, MARTIN LUTHER KING JR.: A LIFE (2002).

²⁴⁰ See WALTON, *supra* note 128, at 80–81.

²⁴¹ See SOEHARNO, *supra* note 215, at 31.

²⁴² See *id.* at 39; WALTON, *supra* note 128, at 80.

²⁴³ See SOEHARNO, *supra* note 215, at 33–34.

²⁴⁴ See McFall, *supra* note 236, at 10.

²⁴⁵ See SOEHARNO, *supra* note 215, at 33.

²⁴⁶ See CARTER, *supra* note 225, at 10 (noting the importance to integrity of discerning right from wrong, a position that assumes that there is, in some sense, an objectively morally right principle to find—or at least one within the range of principles that merit admiration).

²⁴⁷ See ERIC JOHNSON, NAZI TERROR: THE GESTAPO, JEWS, AND ORDINARY GERMANS (2000) (describing the Holocaust and arguing for the moral responsibility of any ordinary Germans who believed and acted consistently with Hitler's racial ideology or were simply too cowardly to oppose it).

B. Judicial Integrity

1. Judicial Integrity Defined and Linked to the Exclusionary Rule

i. Judicial Integrity Has Roots in the General Concept of Integrity

Judicial integrity as a concept largely parallels the general idea of integrity but with qualifications and amplifications arising from the judge's institutional role. It is thus not the judge's personal integrity that matters but rather his integrity in the role of judge.²⁴⁸ Restated, his principles must be those embraced by the law and not his own, private principles. That is an aspiration that can never fully be achieved, but it must be the judge's active goal and that of those engaged in institutional design of a judiciary that will achieve its proper social goals.²⁴⁹ A trial judge whose personal beliefs were pro-life, for example, and who therefore declared all abortions unconstitutional, in direct defiance of *Roe v. Wade*,²⁵⁰ would not be acting with judicial integrity, though perhaps he would be acting with personal integrity.

Two aspects of the judge's institutional context are key: first, that he must serve the rule of law; second, that he must do so in a way consistent with the democratic nature of the polity he serves.²⁵¹ Each aspect carries with it implications for judicial integrity.

ii. The Rule of Law Requires Consistency and the "Right" Judicial Character

The rule of law includes, among other things, these concepts: (1) having a government that limits its own power by abiding by standing laws; (2) fostering equality before the law, meaning at a minimum that government officials and other powerful persons are treated the same by the law as are ordinary folk; and (3) achieving enforced human rights.²⁵² But the meaning of "equality before the law" and "human rights" can vary based upon cultural understandings and can be hard to determine in specific cases.²⁵³ Moreover, sometimes these aspects of the rule of law can seem to conflict with other aspects, such as preserving "law and order,"

²⁴⁸ See SOEHARNO, *supra* note 215, at 44 (arguing that "[t]he institution determines the scope of prudence and without virtue, institutions as organizations risk diverting into estrangement from their core values").

²⁴⁹ See *id.* at 70–72.

²⁵⁰ 410 U.S. 113 (1973).

²⁵¹ See SOEHARNO, *supra* note 215, at 20–24.

²⁵² See Rachel Kleinfeld, *Competing Definitions of the Rule of Law*, in RULE OF LAW ABROAD, *supra* note 80, at 34–36.

²⁵³ See *id.* at 32.

that is, public safety.²⁵⁴ That leaves the judge with some apparent measure of discretion, albeit within a zone of what exercises of discretion observers will accept as reasonable.²⁵⁵

Yet the legitimacy of the judicial function rests on decisions based on *law*, not private judicial values or whim.²⁵⁶ Maintaining legitimacy thus requires choosing persons as judges who are of the right professional character, without whom the promise of the rule of law “remain[s] an empty shell.”²⁵⁷ The “right professional character” is one that aims at the public’s interest over the individual’s private ones and that deliberates with the reasoned goal of serving the purposes of the judiciary, an institution rooted in law, not men.²⁵⁸ Judicial integrity thus requires *persons of integrity*, who will do all they reasonably can to achieve wholeness of principles drawn from their role and judicial actions consistent with those principles.²⁵⁹

iii. Democracy Requires Judicial Accountability and Candor

Democracy correspondingly requires public acceptance of judicial power.²⁶⁰ That does not mean that the public must agree with every decision of a judge or judicial body. But, over time, the public must broadly accept the institutional power of judges as consistent with the People’s rule.²⁶¹ Such acceptance requires the public to trust the judiciary as a whole.²⁶² That is hard for two reasons.

First, citizens can never truly know the subjective motives for a judge’s decision.²⁶³ Such motives matter to people making procedural justice judgments.²⁶⁴

²⁵⁴ See *id.* at 39–42; Thomas Carothers, *The Problem of Knowledge*, in RULE OF LAW ABROAD, *supra* note 80, at 15.

²⁵⁵ See SOEHARNO, *supra* note 215, at 21–22.

²⁵⁶ See *id.* at 21.

²⁵⁷ *Id.*

²⁵⁸ See *id.* at 36–37, 39–40.

²⁵⁹ See *id.* at 46.

²⁶⁰ See *id.* at 21–22.

²⁶¹ See *id.*

²⁶² See *id.* at 22; HENRY S. RICHARDSON: DEMOCRATIC AUTONOMY: PUBLIC REASONING ABOUT THE ENDS OF POLICY 32 (2002) (“Whether one should trust government is in part a function of whether that government is a democracy that is of, for, and by the people . . .”).

²⁶³ See SOEHARNO, *supra* note 215, at 22.

²⁶⁴ See TOM R. TYLER, WHY PEOPLE COOPERATE: THE ROLE OF SOCIAL MOTIVATIONS 105–07 [hereinafter TYLER, WHY PEOPLE COOPERATE] (2011) (treating trust as either an antecedent of procedural justice—the sense of being involved in fair procedures—or as occurring in parallel to procedural justice—and noting that “we typically find that it is the most important issue shaping procedural justice judgments in the context of personal experiences with an authority . . .”). There are two types of trust: instrumental, meaning making yourself vulnerable to another whom you confidently expect to behave in certain expected ways, and motive-based trust, meaning the expectation that

The judge's stated reasons for action—if any are stated—may simply be window-dressing for more self-serving motivations.²⁶⁵ Nor does the public generally have access to the judge's private, internal deliberations or those with his colleagues or law clerks.²⁶⁶ That de facto secrecy also raises questions about the trustworthiness and fairness of the judicial decision making process. Such trust is especially needed precisely because some measure of judicial discretion is unavoidable.²⁶⁷

Second, most citizens lack the technical knowledge to judge on their own the correctness of a judge's decision.²⁶⁸ The most effective way to allay public concern about these matters is to have clear systems of judicial accountability.²⁶⁹ Accountability can be fostered by a system of appeals, some measure of lay participation, and a statement of the grounds for decisions sufficient to permit detailed scrutiny.²⁷⁰

Note that these two aspects of integrity mirror those under the more general analysis of integrity, requiring both a character of integrity as revealed in action and sound moral principles whose purity must be protected.²⁷¹ Note too that, like with the general idea of integrity, there are objective and social manifestations, meaning integrity must exist in fact and be seen as existing.²⁷² "Saying" as candidly as possible why action was taken and how it is consistent with principle—a form of public accountability—is part of promoting the perception of integrity at work.²⁷³ Importantly, however, the public support that judicial

authorities will act from benevolent motivations and show concern for others' well-being. *See id.* at 30–31, 42. Both types of trust matter. *See id.* at 105–07.

²⁶⁵ *See* SOEHARNO, *supra* note 215, at 21 (democratic legitimacy requires that an authority's actions be seen as aimed at the public interest, not private, self-interest).

²⁶⁶ *See id.* at 22 ("A litigant cannot 'check' the 'real' reasoning of the judge.").

²⁶⁷ *See id.*

²⁶⁸ *See id.*

²⁶⁹ *See id.* at 22–23.

²⁷⁰ Philosopher Jonathan Soeharno finds it sufficient for courts to state reasons subject to critique, even if those reasons are mere rationalizations for the true bases of decision. *See id.* at 121–25. But moral economist Lanse Minkler rejects on empirical grounds the idea that moral reasons are rarely more than rationalizations for action. Minkler contends that data proves that individuals' actions *are* motivated by moral reasons. *See* MINKLER, *supra* note 205, at 41. It may not be possible to divine every unconscious motivation for our actions, but we can try to do so and can do good enough. *See* WILSON, *supra* note 202, at 175, 208–09, 211–12, 218–21. Honesty, including with one's self, says Winkler, is an important virtue to cultivate if integrity is to prevail. *See* MINKLER, *supra* note 205, at 38–39.

²⁷¹ *See supra* text accompanying notes 224–47; SOEHARNO, *supra* note 215, at 22–23 (discussing judicial purity).

²⁷² *See supra* text accompanying notes 228–42; *cf.* SOEHARNO, *supra* note 215, at 24 (viewing the factual part of integrity as turning on judges with the proper character and the social part turning on accountability).

²⁷³ *See* CARTER, *supra* note 225, at 7; TYLER, *supra* note 264, at 106 (explaining that motive-based trust requires the opportunity to present concerns to a neutral authority and

integrity requires is not support for any particular legal rule, doctrine, or principle. The kind of support required is for the judiciary as an institution of non-self-serving judges of good professional character, committed to the rule of law, and restrained by systems of public accountability.²⁷⁴ The failure of the judiciary to meet either the objective (consistency in reality) or subjective (perceived consistency) requirements of integrity eats away at the judiciary's purity of identity as one committed to the rule of law in a democracy.

iv. Application to the Exclusionary Rule

When the judiciary recognizes a violation of the Fourth Amendment but provides no remedy, the judiciary has, as explained earlier, engaged in an act of hypocrisy—the very opposite of acting with integrity.²⁷⁵ Such an action does not call into question the conscious good faith of the judges, but it does call into question whether they, as representatives and members of an institution, have the character—particularly the strength of will—to overcome unconscious willful blindness.²⁷⁶ Acting in a way contrary to such blindness promotes overcoming it, as empirical studies described elsewhere have demonstrated.²⁷⁷ Moreover, because the true reasons for decision are not stated (that is partly what hypocrisy means), the judge is shielded from adequate accountability (reasons not known cannot be criticized).

The lack of an exclusionary remedy also deprives those most motivated to challenge police action, criminal defendants, from just that motivation because they cease to benefit from the Constitution's rules. That also means there will be no suppression hearings because suppression is not a legal option. But without suppression hearings, defendants have no practical vehicle for expressing their relevant constitutional views, thus being denied an opportunity for effective voice to protest the state's treatment of them as inconsistent with the Fourth Amendment.²⁷⁸ Denial of voice further undermines judicial accountability because

being treated by authorities with dignity and respect, beliefs that both these things are occurring being facilitated "by justifying their decisions in ways that make clear that they have considered the arguments raised and either can or cannot accept those arguments").

²⁷⁴ See SOEHARNO, *supra* note 215, at 22; TYLER, *supra* note 264, at 42–43 (motive-based trust is linked to judgments about the trustworthy *character* of the decision maker).

²⁷⁵ See *supra* text accompanying Part II.

²⁷⁶ See *supra* note 202 and accompanying text (discussing unconscious willful blindness).

²⁷⁷ See *supra* text accompanying notes 276–77 (supporting this point).

²⁷⁸ See BRUNO S. FREY, *HAPPINESS: A REVOLUTION IN ECONOMICS* 110 (2008) (discussing empirical data on voice); Victoria Smith Holden, *Effective Voice Rights in the Workplace*, in *FREEDOM OF EXPRESSION: CRITICAL PERSPECTIVES ON FREEDOM OF EXPRESSION* 114, 114–24 (David S. Allen & Robert Jensen eds., 1995) (explaining effective voice); E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF*

the court has no need to explain why it rejects defendant's arguments, defendant having not been allowed to present Fourth Amendment arguments in the first place.

Additionally, an institution composed of judges unwilling to take risky action consistent with the admitted observation of the violation of constitutional principles (admitted in the sense that remedies are only needed if the law has been violated) and largely shielded from true public accountability lacks objective integrity and risks losing institutional legitimacy.²⁷⁹ That the public may support, in the abstract and when not fully informed, the elimination of the exclusionary rule as thereby fostering "law and order" (a point that can be subject to much dispute)²⁸⁰ is irrelevant. Trust in the judiciary as an institution overall may fall.

But, even if it does not, that would be merely an instance of the judiciary successfully duping the People. As one commentator put it, "[l]ying is a form of coercion because it intentionally attempts to induce another to act or believe differently than they would if they knew the truth."²⁸¹ But unconscious "intentional" lying can occur if conscious words and deeds are motivated by less-than-fully-conscious inappropriate but unstated contrary reasons.²⁸² Hypocrisy, a sort of anti-integrity involving an element of deceit, can likewise exist even absent *consciously* wrong action.²⁸³ Such deceit is thus an exercise of judicial coercive power over the People, leading to an inconsistency between words and deeds that a judiciary of integrity should not tolerate.

2. Promoting Judicial Integrity

Integrity can fail for at least five reasons: (1) "failure to choose moral principles, (2) weakness of will, (3) errors in judgment, (4) self-deception, and (5) moral exclusion."²⁸⁴ Judges admitting to a Fourth Amendment violation have chosen the right moral principles—those embodied in the relevant provision of the Bill of Rights. But, giving such judges a deserved benefit of the doubt, their

PROCEDURAL JUSTICE 170–72 (1988) (explaining the connection between voice and procedural justice).

²⁷⁹ See *supra* text accompanying notes 227–30 (integrity is tested primarily when there is a cost to the individual in being consistent).

²⁸⁰ See *supra* text accompanying notes 345–46.

²⁸¹ MINKLER, *supra* note 205, at 85.

²⁸² See *supra* note 131 and accompanying text (discussing unconscious motivated reasoning); MELE, *supra* note 202, at 13–18, 29–30 (discussing the element of intention in unconscious self-deception, including unconscious motivated-reasoning, motivated, that is, by a kind of self-interest). One of the major benefits of self-deception, however, is its ability to improve our effectiveness in convincingly lying to others. See DAVID LIVINGSTON SMITH, *WHY WE LIE: THE EVOLUTIONARY ROOTS OF DECEPTION AND THE UNCONSCIOUS MIND* 3 (2004).

²⁸³ See *supra* text accompanying notes 119–27 (discussing unconscious hypocrisy).

²⁸⁴ See MINKLER, *supra* note 205, at 37.

failure to provide a viable remedy for this violation reflects, as noted above, both insufficient strength of will and self-deception.²⁸⁵

But moral training and education can help judges improve on both scores.²⁸⁶ Judicial language matters.²⁸⁷ The current cost-benefit language used by the courts in discussing the purpose of the exclusionary rule is a utilitarian, more specifically, an economic, form of reasoning.²⁸⁸ Although utilitarianism is a moral position, cost-benefit language lacks moral resonance, failing to frame the problem overtly enough as one of political morality. For example, some studies have shown that repeated exposure of students to the language of economics blinds them to other sources they had previously routinely relied upon in making moral judgments, such as compassion and empathy.²⁸⁹ Moral language helps speakers and listeners alike in perceiving the moral content and consequences of situations.²⁹⁰ Moral language thus promotes a moral awareness otherwise lacking.²⁹¹

Here, the moral language of “taint” or “corruption” associated with admitting illegally seized evidence that is embraced by advocates of the judicial integrity

²⁸⁵ See *supra* text accompanying notes 225–32.

²⁸⁶ See MINKLER, *supra* note 205, at 128–29.

²⁸⁷ See *id.* at 129 (“By framing certain situations in moral language, people come to perceive the moral content of other situations.”).

²⁸⁸ See Orin Kerr, *An Equilibrium-Adjustment Theory Of The Fourth Amendment*, 125 HARV. L. REV. 456, 526 (2011) (“Most theories of the Fourth Amendment are premised on some sort of proper balance of police power. To a utilitarian, the Fourth Amendment requires a balance of police power to maximize social welfare.”); James J. Tomkovicz, *Hudson v. Michigan and the Future of Fourth Amendment Exclusion*, 93 IOWA L. REV. 1819 (2008) (describing the Court’s exclusionary rule jurisprudence as turning on variants of cost-benefit analysis).

²⁸⁹ See, e.g., Robert H. Frank, *The Status of Moral Emotions in Consequentialist Moral Reasoning*, in MORAL MARKETS: THE CRITICAL ROLE OF VALUES IN THE ECONOMY 42, 54 (Paul J. Zak ed., 2008) (finding economics majors twice as likely as non-majors to defect in prisoners’ dilemma games, with the effect magnified by a longer duration of studying neoclassical economics). But see Maurice E. Stucke, *Money, Is That What I Want?: Competition Policy and the Role of Behavioral Economics*, 50 SANTA CLARA L. REV. 893, 917 n.147 (2010) (noting some conflicting data). Appeals to self-interest and the language of incentives can also at times prove counterproductive, with highlighting ethical norms a better way to deter unwanted behavior than with financial penalties. See *id.* at 914; DAN ARIELY, *PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS* 69–74 (2008). Moreover, compassion and empathy are necessary for effective moral reasoning and action, and parents, religions, and schools seek to teach these things rather than the language of calculation and self-interest. See Stucke, *supra*, at 916, 927, 928. Additionally, valuing self-interest and increased economic output and efficiency may crowd out empathy and compassion for persons of lower social status, see *id.* at 956–60, as is true of most criminal defendants.

²⁹⁰ See MINKLER, *supra* note 205, at 129–30.

²⁹¹ See *id.*

rationale for the exclusionary rule is not about personal morality.²⁹² Rather, it is about the principles of political morality written into the Constitution, and the real world moral consequences of interpreting the Constitution in one way rather than another.²⁹³ As I have explained elsewhere, the Framers indeed likely chose such capacious constitutional terms as “reasonable” searches and seizures to capture the political-moral content of these provisions.²⁹⁴

Judges’ use of moral language also serves another goal: promoting the shared bonds that form the American People. A shared public morality, including minimal common standards of honor and respectability, is necessary to the creation and continued existence of a political community.²⁹⁵ Only shared language, expressed in moral terms by institutions legitimately seen as expressing the People’s public morality, can achieve this goal.²⁹⁶

That is partly why political debates are conducted in moral terms.²⁹⁷ Indeed, it is one reason that hypocrisy in the public sphere is the “homage vice pays to virtue.”²⁹⁸ In other words, public political actors must appeal to moral principles and cannot effectively persuade enough other political actors based solely in the language of self-interest or narrow ideology.²⁹⁹ The same is true of judges. Speaking of the exclusionary rule openly and repeatedly in terms of “integrity” and reliance on evidence wrongly seized as eliciting judicial “disgust” helps to frame the situation as one of deep political moral principle rather than legal technicality.³⁰⁰

Practicing thinking in moral terms also helps to improve moral judgment: the ability to tell right from wrong. Improving such judgment is enhanced by transformational leaders who “inspire, and offer a collective vision based on the

²⁹² See *supra* text accompanying notes 222–23 (concerning taint and cognate terms under this rationale); *infra* text accompanying notes 325–40 (concerning corruption).

²⁹³ Andrew E. Taslitz, *The Expressive Fourth Amendment: Rethinking the Good Faith Exception to the Exclusionary Rule*, 76 MISS. L.J. 483, 485 n.10 (2006) [hereinafter Taslitz, *Expressive Fourth Amendment*]; Sharon L. Davies, *The Penalty of Exclusion: A Price or a Sanction?*, 73 S. CAL. L. REV. 1275 (2000) (arguing that the exclusionary rule is best understood as imposing a moral “sanction” designed to communicate messages of “wrongful” police behavior rather than a “price” imposed for engaging in inefficient conduct).

²⁹⁴ See Taslitz, *Expressive Fourth Amendment*, *supra* note 293, at 485 n.10; SCHULHOFER, *supra* note 45, at 41, 44, 53–55, 121–22, 173–77.

²⁹⁵ See GRANT, *supra* note 141, at 49.

²⁹⁶ See *id.*

²⁹⁷ See GEORGE LAKOFF, *THE LITTLE BLUE BOOK: THE ESSENTIAL GUIDE TO THINKING AND TALKING DEMOCRATIC* (2012).

²⁹⁸ See GRANT, *supra* note 141, at 13 (quoting the Duke of Rochefoucauld).

²⁹⁹ See *id.* at 40–42.

³⁰⁰ See *supra* text accompanying notes 290–92 (explaining that language can serve as a reminder of moral principles, thereby triggering moral thinking that might otherwise not occur); MINKLER, *supra* note 205, at 130–31 (explaining the role of moral framing in encouraging integrity).

group good.”³⁰¹ The United States Supreme Court, by articulating a clear vision of what judicial integrity means and why it is necessary, permits itself to serve as a transformational leader. Moral judgment is also improved by having decision makers pay more attention to information that is morally relevant.³⁰² The suppression hearing itself enables the parties to bring such information to the judicial attention.

Sustained attention to courts acting with integrity furthers higher, more abstract moral thinking as well.³⁰³ That itself improves moral judgment, while demonstrating integrity as a moral priority.³⁰⁴ That can promote moral intent—the desire to act consistently with principle.³⁰⁵ For such intent to turn into action that tests integrity, the courts must be willing to risk congressional disapproval and perhaps the short-term disapproval of an insufficiently-informed public—insufficiently informed, that is, about the valuable political functions of Fourth Amendment freedoms and their benefits when defended in particular cases.³⁰⁶ By suppressing wrongly-seized evidence, courts use the only weapon at their disposal to register disapproval of constitutionally illegitimate executive action. The courts thus act with a consistency to principle that Congress, as a more nakedly partisan body, may too often lack, thereby asserting defiance of congressional and executive actions lacking in constitutional integrity.³⁰⁷ This perspective may be one way to understand the libertarian CATO Institute’s support for the exclusionary rule as essential to the separation of powers.³⁰⁸ The more judges exercise such courage, the more they develop the character traits needed to serve as effective counterweights to abuses by other branches.³⁰⁹

Such judicial displays of courage expressed in moral language can furthermore serve as moral exemplars to inspire integrity and commitment to

³⁰¹ See MINKLER, *supra* note 205, at 132.

³⁰² See *id.* at 129–30.

³⁰³ See *id.* at 131–32.

³⁰⁴ See *id.*

³⁰⁵ See *id.* at 129, 132–33.

³⁰⁶ See *id.* at 133–34 (turning moral intent into moral action requires overcoming weakness of will and developing a sense of responsibility to act). Such public criticism should fade in the long run if the Court properly explains its actions in terms that the public can readily understand via media coverage. See *infra* text accompanying notes 342 (analyzing legitimacy and the exclusionary rule); JOSEPH GOLDSTEIN, *THE INTELLIGIBLE CONSTITUTION: THE SUPREME COURT’S OBLIGATION TO MAINTAIN THE CONSTITUTION AS SOMETHING WE THE PEOPLE CAN UNDERSTAND* 19 (1992).

³⁰⁷ Cf. Lynch, *supra* note 12, at 5–7 (discussing separation of powers justifications for the exclusionary rule).

³⁰⁸ See Lynch, *supra* note 12, at 1, 11–14, 21–24.

³⁰⁹ See *supra* text accompanying notes 201, 277 (explaining how changing behavior changes even underlying unconscious thoughts).

constitutional principle by others, that is, to serve as “omnipresent teachers.”³¹⁰ Such teaching may need to come from more than the courts and may take time, but many judges opposed to slavery and to Jim Crow after *Brown v. Board of Education*³¹¹ did not shrink from this hope.³¹²

Finally, moral exclusion occurs when individuals or groups are perceived as outside the circle of moral concern.³¹³ Those outside the circle are not entitled to the same, perhaps not to any of the, rights held by members within the circle.³¹⁴ Moral exclusion can also occur unconsciously.³¹⁵ It often manifests itself in lying about moral exclusion’s existence.³¹⁶ The risk of moral exclusion is high in the criminal justice system.³¹⁷ Ample empirical data demonstrates that poor racial minorities are often viewed unconsciously as “other” by all actors within the criminal justice system.³¹⁸ Such actors can thus act in ways contrary to their professed principles in a process I have called “racial blindsight”—not consciously

³¹⁰ See MINKLER, *supra* note 205, at 132 (discussing the value of leaders acting as moral exemplars). Justice Brandeis, dissenting in *Olmsted v. United States*, 277 U.S. 438, 485 (1967) (Brandeis, J., dissenting), famously said:

Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.

³¹¹ 347 U.S. 483 (1954).

³¹² See JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY* xxvii–iii (2002) (recounting the history of *Brown* and the 50-year effort of courts and litigators to enforce it.). I am not here addressing whether *Brown* succeeded in improving the quality of education for African-Americans. My point, rather, is both that the judges involved sometimes spoke in moral language and displayed some degree of courage and that *Brown*’s symbolism helped over time to mold racial attitudes, along with other forces, in a more progressive direction.

³¹³ See MINKLER, *supra* note 205, at 37, 39–40.

³¹⁴ See *id.* at 39–40.

³¹⁵ See *id.*; Andrew E. Taslitz, *Racial Blindsight: The Absurdity of Color-Blind Criminal Justice*, 5 OHIO ST. J. CRIM. L. 1, 1–4 (2007) [hereinafter Taslitz, *Racial Blindsight*] (explaining how it is possible to treat others as unworthy and different, while being aware of it at some accessible but less-than-fully-conscious level).

³¹⁶ See Taslitz, *Racial Blindsight*, *supra* note 315, at 1, 8. Cf. Charles Ogletree, Robert J. Smith, & Johanna Wald, *Coloring Punishment: Implicit Social Cognition and Criminal Justice*, in *IMPLICIT RACIAL BIAS ACROSS THE LAW* 45, 60 (Justin D. Levinson & Robert J. Smith eds., 2012) (arguing that revealing implicit racial bias sometimes just allows us to see what we previously denied).

³¹⁷ See Taslitz, *Respect and the Fourth Amendment*, *supra* note 72, at 21–29.

³¹⁸ See Taslitz, *Status Quo Bias*, *supra* note, at 41, at 49–52.

seeing the racial and class based harm these actors inflict as they carry out the obligations placed on them by their institutional roles.³¹⁹ It becomes easier, even when seeing that outsiders have been denied constitutional rights, to deny them remedies for systemic humiliation.³²⁰ They are unconsciously viewed as unworthy of remedies.³²¹ Their assumed or proven evil actions and character make them deserving of what befalls them.³²² To instead offer them a viable remedy for their abuse is to treat them as within the circle of concern—moral equals, at least in the sense of being entitled to equal respect in the eyes of the law.³²³ The exclusionary rule thus becomes a symbolic device for promoting the sort of equal respect that must underlay any sound conception of the rule of law.

C. Corruption

The concept of corruption (a concept deserving its own article or book) merits brief attention here in further emphasizing the importance of equal respect. “Corruption” is a process of decay from some perceived state of health. “A corrupted thing,” says one philosopher, “has deteriorated from its natural, healthy, innocent, or virtuous condition.”³²⁴ Corruption of *judicial* integrity thus describes a process of decay from the healthy state and natural identity of the judiciary as an institution committed to equal justice under law.³²⁵

Among the sources of corruption is inequality.³²⁶ Inequality promotes the vanity of seeing one person as superior to another. That fosters a need by those of higher status to insult those of lower status, thus confirming the former’s superiority.³²⁷ Indeed, should lower status individuals behave in ways challenging the current distribution of status relations, “superiors” may react retributively.³²⁸

³¹⁹ See Taslitz, *Racial Blindsight*, *supra* note 315, 2–4.

³²⁰ See *id.*; Taslitz, *Fourth Amendment Federalism*, *supra* note 62, at 299 (discussing processes by which, in practice, search and seizure rights deny racial minorities equal voice, respect, and citizenship); Taslitz, *Respect and the Fourth Amendment*, *supra* note 72, at 54–58 (discussing “subpersonhood”).

³²¹ Cf. Taslitz, *Respect and the Fourth Amendment*, *supra* note 72, at 54–58 (defining racial subpersonhood).

³²² See Taslitz, *Status Quo Bias*, *supra* note 41, at 4, 12–13, 49–52.

³²³ Cf. Taslitz, *Respect and the Fourth Amendment*, *supra* note 72, at 23–30.

³²⁴ GRANT, *supra* note 141, at 144.

³²⁵ My definition is thus broader than one that emphasizes abuses of judicial power for private gain, including for furthering the judge’s political or professional ambitions. See SOEHARNO, *supra* note 215, at 7.

³²⁶ See GRANT, *supra* note 141, at 145, 150 (interpreting Rousseau’s views on this point).

³²⁷ See *id.* at 150–51.

³²⁸ Quoting Rousseau directly here is useful:

[C]onsuming ambition, the ardent desire to raise one’s relative fortune less out of genuine need than in order to place oneself above others, instills in all men a black inclination to harm another, a secret jealousy which is all the more

This cognitive process in turn promotes progressive isolation from, and an inability to understand and identify with, those of lower status.³²⁹ Moreover, “though corruption by power entails an interaction between individual and group, the social influence on individual thinking remains invisible. Corruption is thus a perceptual distortion. It is a disorder of cognition and epistemology, and is parasitic on the invisibility of the processes by which meaning is constructed.”³³⁰ Judicial self-deception is thus enabled by corruption, preventing exposing the former to the disinfectant of transparency.³³¹

The risk of such corruption is particularly high in the criminal justice system. Part of the purpose of such a system is to stigmatize wrongdoers.³³² When accused wrongdoers already face the disabilities of lower social status, deserved stigma for behaving badly can shade into degrading defendants as less than full human beings.³³³ The ordinarily unconscious nature of this process hides its work.³³⁴ Judges can thus be blissfully unaware of their institution’s decay while they go about the task of insulting or excessively punishing their “upstart” “inferiors.”³³⁵

dangerous as it often assumes the mask of benevolence in order to strike its blow in greater safety: in a word, competition and rivalry on the one hand, conflict of interest on the other, and always the hidden desire to profit at the expense; all these evils are the . . . inseparable train of nascent inequality.

JEAN JACQUES ROUSSEAU, *THE FIRST AND SECOND DISCOURSES TOGETHER WITH THE REPLIES TO CRITICS AND ESSAY ON THE ORIGIN OF LANGUAGES* 181 (Victor Gourevitch ed., trans., 1986) (1754). Cf. Sheri Lynn Johnson, *Race and Capital Punishment*, in *BEYOND REPAIR? AMERICA’S DEATH PENALTY* 121, 135–39 (Stephen P. Garvey ed., 2003) (arguing that some whites are “regressive” racists, seemingly able to accept egalitarian norms, except when their anger is aroused by racial insult; such insult occurs, for example, in a black assault upon a white victim, which strengthens racial stereotypes; this phenomenon helps explain the greater likelihood of a death sentence in such black offender/white victim situations.).

³²⁹ See RICARDO BLAUG, *HOW POWER CORRUPTS: COGNITION AND DEMOCRACY IN ORGANISATIONS* 104 (2010).

³³⁰ *Id.*

³³¹ See *supra* text accompanying notes 122–27 (discussing self-deception); see generally Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1108 (2000) (discussing the many social and organizational benefits of transparency in restraining abuses of power).

³³² See Andrew E. Taslitz, *The People’s Peremptory Challenge and Batson: Aiding the People’s Voice and Vision through the “Representative” Jury*, 97 IOWA L. REV. 1675, 1693–94 (2012) [hereinafter Taslitz, *Voice and Vision*].

³³³ See Taslitz, *Civil Society*, *supra* note 83, at 355–66.

³³⁴ Cf. Taslitz, *Voice and Vision*, *supra* note 332, at 1696–97 (discussing unconscious racial scorn by prosecutors); Taslitz, *Incautious Media*, *supra* note 83, at 1298–99 (discussing unconscious nature of much racial status subordination in the criminal justice system).

³³⁵ Cf. William T. Pizzi et al., *Discrimination in Sentencing on the Basis of Afrocentric Features*, 10 MICH. J. RACE & L. 327, 352 (2005) (concluding that sentencing

But providing procedural justice in the form of effective voice, as a suppression hearing can do, expresses equal respect by ruler for the ruled.³³⁶ It may, therefore, counteract the retarding of moral judgment that hierarchical social systems encourage. By reinvigorating such judgment, judges may at least sometimes be more moved to give defendants' claims due consideration.³³⁷ But no exclusionary rule means no suppression hearing, thus no anti-corrupting influence of the effective voicing of grievance.

Finally, the language of corruption has a mystical element about it.³³⁸ The metaphor of disease that underlies corruption creates a sense that the source of corruption undermines the spiritual essence of the thing corrupted.³³⁹ Such magical thinking can have important benefits. It promotes expulsion of the corrupting source from the judicial body.³⁴⁰ That too makes exclusion an

harshness is linked to the extent of the defendant's "Afrocentric features" as distinct from skin color).

³³⁶ See Yochi Cohen-Charash & Paul Spector, *The Role of Justice in Organizations: A Meta-Analysis*, 86 ORG. BEHAV. & HUM. DECISION PROCESSES 278, 294, tbl.2 (2001) (finding a strong correlation between voice and perceptions of procedural justice); Andrew E. Taslitz, *Bullshitting the People: The Criminal Procedure Implications of a Scatological Term*, 39 TEX. TECH L. REV. 1383, 1412–13 (2007) (arguing that denial of procedural justice is a marker of low social status, providing such justice of high status, and is probably so understood by all parties involved).

³³⁷ As noted earlier, voice also enhances accountability, but greater accountability improves individual performance at a wide array of tasks. See Taslitz, *Police Are People Too*, *supra* note 158, at 52–54, 61–67.

³³⁸ See LAWRENCE LESSIG, *REPUBLIC LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* 11 (2011) (suggesting that the common view of corruption includes evoking images of "vampires or dragons"). Cf. John Copeland Nagle, *Corruption, Pollution, and Politics*, 110 YALE L.J. 293, 307–09 (2000) (ELIZABETH DREW, *THE CORRUPTION OF AMERICAN POLITICS: WHAT WENT WRONG AND WHY* (1999)) (arguing that corruption of legislative electoral politics by interest group money is better described as "pollution" because the source of distortion comes from outside the legislature).

³³⁹ See LESSIG, *supra* note 338, at 11 (suggesting that corruption in campaign financing is best viewed as a "disease" of democracy).

³⁴⁰ See RACHEL HERZ, *THAT'S DISGUSTING: UNRAVELING THE MYSTERIES OF REPULSION* 7, 9, 37, 208–09 (2012) (noting that physical disgust originated in the need to expel contaminants, diseases, or other substances causing illness or infection and that moral and political disgust at social contaminants evoke similar reactions). Professor Ricardo Blaug relies on another metaphor, from information technology, namely that of a "corrupted" computer file, which "denotes a mistake, a line of broken code buried deep; a recurrent source of error." BLAUG, *supra* note 329, at 2–3. He sees this image as linked to an older definition of corruption than the usage denoting taking kickbacks. See *id.* at 2. That older definition is what, argues Blaug, Lord Acton meant in saying that "power corrupts," meaning it signifies a "general failure to orient to the common good, a crisis of moral judgment and an aggrandized and hubristic distortion of individual thinking." *Id.* at 2.

appropriate reaction to receiving evidence tainted by its source: violation of the constitutional rights that define us.

D. Public Perceptions and Legitimacy

1. Overview

Even supporters of a capacious judicial integrity rationale have focused solely on the idea of integrity as concerning public confidence in the justice system.³⁴¹ That differs from the view defended here that judicial integrity turns *both* on public perceptions and on the reality of principled judicial action. Nevertheless, perceptions do matter.

But there is an important distinction concerning the thing in which the public must have confidence. Here I have argued that the relevant sort of public perception is confidence that courts are acting *as courts should*, regardless of whether the public agrees with any particular decision.³⁴² The Court's original articulation of judicial integrity seemed to rest on a similar idea.³⁴³ But the modern Court, when it addresses judicial integrity at all, is instead concerned that a too ready, or perhaps any, application of the exclusionary rule is what undermines public trust in the judiciary; that is so, says the Court, because the guilty go free given that the constable has

³⁴¹ See Bloom, *supra* note 14, at 464 (describing the integrity rationale as making the Court a "beacon or a symbol to society for ensuring lawful acts by the forces of government," thus focusing on "public perceptions" by painting the Court as an exemplar of lawfulness that does not even appear to be associated with unlawful actors).

³⁴² See *id.* at 465–70 (arguing as well for this idea of the role of public perceptions). Political scientist Tom S. Clark's work supports my position here and amplifies what I mean by courts acting "as courts." Clark argues that the Court's ability to decide cases without undue interference from other political bodies and to see its decisions enforced rests on "diffuse support." See TOM S. CLARK, *THE LIMITS OF JUDICIAL INDEPENDENCE* 15–17 (2011). Diffuse support is not support for any particular case. See *id.* at 17. Rather, it is "broad support for the Court as an institution." *Id.* It is thus support that allows the Court at times "to give effect to potentially politically unpopular decisions." *Id.* In other words, the Court is significantly, though not solely, concerned with its "institutional integrity." *Id.* at 14. But the maintenance of the Court's institutional legitimacy importantly, though not solely, depends on "the maintenance of the image of the courts as apolitical, legal institutions." *Id.* at 21. The Court is thus most likely to exercise restraint when it believes that its institutional legitimacy is endangered, not when it fears lack of support for any single decision it makes. See *id.* at 269. The Court need not necessarily have majority support, but it must have enough public support to maintain a degree of independence. See *id.* at 262. For this reason, it can sometimes act in counter-majoritarian fashion. See *id.* at 262–63. But see Mark A. Graber, *Constructing Judicial Review*, 8 ANN. REV. POL. SCI. 425, 427–28 (2005) ("Judicial review does not serve to thwart or legitimate popular majorities; rather that practice alters the balance of power between the numerous political movements that struggle for power in a pluralist democracy.").

³⁴³ See generally *supra* note 342 (summarizing case law).

blundered.³⁴⁴ Several polls also apparently show that, when asked in the abstract, most people are indeed opposed to the exclusionary rule.³⁴⁵

But the available empirical data on procedural justice and taint psychology suggest that these quick, off-the-cuff survey responses to abstract questions are misleading. It is the failure to apply the exclusionary rule that undermines confidence in the judiciary in the long run.³⁴⁶ Furthermore, the exclusionary rule furthers judicial legitimacy by promoting procedural justice.

2. Procedural Justice

Procedural justice research has consistently found that people are more likely to obey the law and cooperate with authorities, including the police, when they are involved in fair procedures.³⁴⁷ Among the most important of these procedures when they aim at resolving conflict is affording people a voice in the outcomes that affect them.³⁴⁸ Procedural justice, because it fosters legitimacy (a sense of

³⁴⁴ See *United States v. Leon*, 468 U.S. 897, 908 (1984) (quoting *Stone v. Powell*, 428 U.S. 465, 490 (1976)) (declaring that exclusion of probative evidence and the resulting freeing of a factually guilty defendant, especially where police violations of the Fourth Amendment were minor or unintentional, “generate disrespect for law and administration of justice”).

³⁴⁵ See Kenworthy Bilz, *Dirty Hands or Deterrence? An Experimental Examination of the Exclusionary Rule*, 9 J. EMPIRICAL LEGAL STUD. 149, 166 (2012). But see SHMUEL LOCKE, CRIME, PUBLIC OPINION, AND CIVIL LIBERTIES: THE TOLERANT PUBLIC 45 (1994) (finding that, across all educational levels, substantial majorities resist admitting illegally-seized evidence at trial). But cf. JULIAN V. ROBERTS, LORETTA J. STALANS, DAVID INDERMAUR & MIKE HOUGH, PENAL POPULISM AND PUBLIC OPINION: LESSONS FROM FIVE COUNTRIES 21–60 (2003) (arguing that research involving “informed subjects” and case-specifics rather than off-the-cuff simple polling shows much more lenient and complex public attitudes toward many issues of criminal justice than is suggested by the polls, yet it is the polls on which politicians rely to set policy).

³⁴⁶ See *infra* text accompanying notes 346–95. It is worth noting that the press may play some role in affecting perceptions of the courts’ legitimacy, with a big part of the problem being that the press is often far more likely to report the gist or general statements of opinions or legal rules rather than the detailed sets of facts, rules, and interests involved in a comprehensible way free from overt bias or hyperbole. See Mark Obbie, *Winners and Losers*, in BENCH PRESS: THE COLLISION OF COURTS, POLITICS, AND THE MEDIA 153 (Keith J. Bybee ed., 2007) [hereinafter BENCH PRESS]. See also Keith Bybee, *Introduction: The Two Faces of Judicial Power*, in BENCH PRESS, *supra*, at 10 (noting that several authors “suggest the problems plaguing the judiciary can be alleviated by effective communication: if the public is given a more accurate picture of judicial behavior, then citizens will learn that courts are not to be pressured to achieve particular results, but rather are to be valued for their independence and impartiality.”).

³⁴⁷ See TOM R. TYLER & YUEN J. HOU, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND THE COURTS 200–03, 212–14 (2002).

³⁴⁸ See *id.* at 195; Aziz C. Huq, Tom R. Tyler & Stephen J. Schulhofer, *Why Does the Public Cooperate with Law Enforcement?*, 17 PSYCHOL. PUB. POL’Y & L. 419, 421 (2011).

obligation to respect the law beyond any flowing from internalized moral norms), matters even if people expect or receive an unfavorable outcome.³⁴⁹ Procedural justice by the police is also likely to be more effective in deterring and successfully investigating crime than is militaristic policing, though harsh policing methods can sometimes promote a grudging and resentful citizen compliance with the law—while lacking the benefit of promoting citizen cooperation with law enforcement.³⁵⁰

The legitimacy of governmental authorities, including police and the courts, flows not only from affording citizens a voice, but also by the police and the judiciary themselves abiding by the law.³⁵¹ Several leading researchers in the area of procedural justice have concluded that failure to apply the exclusionary rule is a form of “[o]fficial disregard for the law—made evident when misconduct can be openly exploited to prosecutorial advantage in court”³⁵² Such disregard of the law, they continue, “is the kind of behavior that, the research establishes, tends to weaken perceived legitimacy and willingness to cooperate with law enforcement.”³⁵³ The contrary claim—that not applying the exclusionary rule makes police more effective in catching the bad guys, thus promoting legitimacy³⁵⁴—though not specifically empirically tested, is contrary to the findings of an enormous body of research on law enforcement legitimacy and procedural justice.³⁵⁵ “[I]n virtually every context studied to date, law enforcement effectiveness [in fighting crime and convicting criminals] has displayed at best only a weak influence on perceived legitimacy, while procedural justice concerns are strongly linked to legitimacy, voluntary compliance, and willingness to cooperate.”³⁵⁶ Accordingly, conclude these authors, whatever crime control

³⁴⁹ See TYLER & YUEN, *supra* note 347, at xiii–xvi; TYLER, *supra* note 104, at 34–36; Stephen J. Schulhofer, Tom R. Tyler, & Azis Z. Huq, *American Policing at a Crossroads: Unsustainable Policies and the Procedural Justice Alternative*, 101 J. CRIM. L. & CRIMINOLOGY 335, 344 (2011) (“The psychological model of legitimacy posits that people obey the law, *irrespective of expected rewards and penalties*, when they view the government as worthy of trust and respect.”) (emphasis added).

³⁵⁰ See, Schulhofer, Tyler, & Huq, *supra* note 349, at 350–51 (“[T]he empirical research canvassed here suggests . . . that intensive law enforcement and a readiness to arrest for low-level offenses is far more likely to arouse resentment, weaken police legitimacy, and undermine voluntary compliance with the law” than is a procedural justice strategy, thus making “tough policing” counterproductive); Huq, Tyler & Schulhofer, *supra* note 348, at 427 (noting that, for all three groups studied, “legitimacy is more strongly related to cooperative behavior than were either estimates of police effectiveness or estimates of deterrence effects (i.e., the likelihood that police catch law breakers.”).

³⁵¹ See Schulhofer, Tyler & Huq, *supra* note 349, at 363.

³⁵² *Id.*

³⁵³ *Id.*

³⁵⁴ See *supra* notes 341–53.

³⁵⁵ See Schulhofer, Tyler & Huq, *supra* note 349, at 363.

³⁵⁶ *Id.*

benefit occurs from the prosecution's use of tainted evidence to prove its case will be dwarfed by the damage done to judicial legitimacy in tolerating the police failures adequately to respect constitutional rights.³⁵⁷

3. Taint Psychology

Recent experiments by psychologist and law professor Kenworthy Bilz add further support to the wisdom of the exclusionary rule in promoting perceived judicial legitimacy.³⁵⁸ Bilz's initial study consisted of three experiments. In the first, participants received six scenarios purportedly based on videotape unequivocally showing strong evidence of crime uncovered by searches done without probable cause.³⁵⁹ The scenarios varied the officer's motives from racism, to corruption (stealing money from the suspect's wallet while searching), to simple blundering. Participants were also told either that a citizen review board would sanction the officer by demoting, suspending, or firing him or that the board would not because it was merely designed to keep the public aware of constitutional violations.

Subjects were then asked to measure on a Likert scale (in this experiment ranging from one to six) the intensity of their desire, assuming they were sitting as the judge, to exclude the evidence or not. In this experiment, as in the other two to follow,³⁶⁰ the average Likert scale score "was consistently above the midway point in [expressing participants'] . . . desire to exclude, even when the illegal search was a good-hearted blunder."³⁶¹ The most malevolent motive, racism, led to even more intense desires to suppress the evidence.³⁶² Even when an alternative sanction—a serious one of demoting, suspending, or firing the officer—was available, however, participants still overwhelmingly favored suppression.³⁶³

In a second experiment, Bilz used in her scenarios a street frisk done without probable cause that pre-testing had revealed laypersons considered unreasonable.³⁶⁴ The racism and blunder motives were retained, but personal animosity by the officer replaced corruption. The potential remedy changed from a civilian review board—the efficacy of which subjects might doubt—to the availability of a civil lawsuit. In one condition, the lawsuit was available, in another condition barred by the statute of limitations. Participants were told that if the evidence was excluded, no other evidence was available, and the defendant would be released.

³⁵⁷ See *id.* at 363–64.

³⁵⁸ See Bilz, *supra* note 345, at 166.

³⁵⁹ See *id.* at 155–57.

³⁶⁰ See *id.* at 155–56.

³⁶¹ *Id.* at 166.

³⁶² See *id.* at 156.

³⁶³ See *id.*

³⁶⁴ See *id.* at 157–58; SCHULHOFER, *supra* note 45, at 18 (describing frisks).

Participants were first asked whether they would exclude the evidence if sitting as the judge. A follow-up question asked whether they would change their minds if they knew respectively that a lawsuit could (or could not) be filed.³⁶⁵

Once again, participants' answers favored exclusion in all three motive conditions, with the racism motive prompting the greatest desire for exclusion.³⁶⁶ But participants *were more likely to exclude* when they knew that an alternative potential sanction, such as filing a civil lawsuit, was available.³⁶⁷ This result still obtained when they answered the follow-up question.³⁶⁸ Explained Bilz:

What, then, could cause this surprising finding? Perhaps participants actually care about *alternative ways of sanctioning officers* not for deterrence reasons, but for integrity reasons. Perhaps participants were concerned about the integrity implications of a civil rights lawsuit going in the "opposite direction" of a motion to exclude evidence. If they thought such a suit was likely to go forward and condemn an officer's search, they wanted the judge's own exclusion decision to be consistent with such an outcome.³⁶⁹

I would add that, on the other hand, it may also have been true that if the suit did *not* result in condemning the officer, they wanted the exclusionary rule to do that job—a point to which I return shortly.³⁷⁰ So few participants changed their mind against exclusion when told that an alternative sanction was available that, continued Bilz, it "suggests that people have a desire to see the various branches of government and official actions be consistent with, and even reinforce, one another."³⁷¹ Bilz argues that the results in both her experiments are explainable by a desire not to be "tainted" by "dirty" evidence.³⁷² The dirtiest evidence stemmed from racist motives, thus the greatest desire to exclude that category of evidence.³⁷³

In a third experiment, Bilz put the dirtiness hypothesis to the test more directly. This time, she tested only those legally trained and instructed them on the law.³⁷⁴ They were told that an officer may legally search a vehicle only if he had a warrant issued by a judge based on probable cause, plainly sees evidence of illegality, or gets consent to the search.³⁷⁵ They were even given the names of

³⁶⁵ See Bilz, *supra* note 345, at 157–58.

³⁶⁶ See *id.* at 158.

³⁶⁷ *Id.*

³⁶⁸ See *id.* at 159.

³⁶⁹ *Id.*

³⁷⁰ See *infra* text accompanying notes 371–95.

³⁷¹ See Bilz, *supra* note 345, at 161.

³⁷² See *id.*

³⁷³ See *id.*

³⁷⁴ See *id.* at 162.

³⁷⁵ See *id.* at 162–63.

supporting Supreme Court cases.³⁷⁶ Finally, they were told that, under *Whren v. United States*,³⁷⁷ subjective officer intentions, no matter how offensive, were irrelevant to Fourth Amendment doctrine.³⁷⁸ In all conditions, they were told that the search had been captured on videotape without the officer's knowledge and that he admitted to "stopping the driver because of his race, so in both conditions, the evidence was 'dirty.'"³⁷⁹

The condition varied was whether consent to search was given (in which case the suppression motion should be denied) or not (in which case the motion should be granted). They were asked to follow the law and rule on a motion to exclude. Afterwards, they were asked to choose between a gift for participating of either a highlighter pen with Post-Its in the barrel or a small bottle of disinfectant Purell, gifts pre-tested to be equally desirable and costing exactly the same price.³⁸⁰ They were then asked questions about how angry they were at the officer or the suspect, whether they thought their decision was just or whether it left them feeling "guilty," "satisfied," or "upset."³⁸¹ Finally, they provided some basic demographic data.³⁸²

Most of the participants followed the law, granting the suppression motion where there was no consent, denying it where there was consent.³⁸³ In the clean hands condition, almost all participants chose the pen as the gift. But in the dirty hands (admitting the evidence) condition, they overwhelmingly chose the Purell.³⁸⁴ Those in the dirty hands condition also felt more guilty about their decision, were less satisfied with it, and felt it was less just than in the clean hands condition.³⁸⁵ Despite their legal training, these law students were uncomfortable with allowing into trial tainted evidence that thereby "disabled them from conveying their disapproval of a racist search."³⁸⁶

None of these three experiments tested the precise question addressed here: a court expressly finding evidence violative of the Fourth Amendment but admitting it anyway. But in a brief follow-up study of a smaller number of participants, Bilz asked them to imagine that a judge ruled that seized evidence should be *admitted* at trial but then recommended to a disciplinary board that the officer be sanctioned for conducting an improper search that ferreted out the admitted evidence.³⁸⁷ Over ninety percent of participants found the judge's behavior inconsistent, over eighty

³⁷⁶ *See id.*

³⁷⁷ 517 U.S. 806, 813 (1996).

³⁷⁸ *See Bilz, supra* note 345, at 162–63.

³⁷⁹ *Id.* at 162.

³⁸⁰ *See id.* at 162–63.

³⁸¹ *Id.* at 163.

³⁸² *Id.*

³⁸³ *See id.* at 164.

³⁸⁴ *See id.*

³⁸⁵ *See id.* at 165.

³⁸⁶ *Id.*

³⁸⁷ *See id.* at 166.

percent of that group concluded that this inconsistency would “reflect badly on the criminal justice system.”³⁸⁸ Based on this study and the others that she conducted, Bilz poignantly concluded:

In the legal system, inconsistency looks bad—a notion that has a long line of psychological research to support it In other words, people *do* care about alternative ways police officers might be sanctioned for their mistakes, but not because they are looking for a less costly or more effective *substitute* to exclusion. More likely, they are looking for an *adjunct* to it, seeing alternative sanctions as additional ways for the system to express official disapproval of illicit searches.³⁸⁹

One final point, Bilz’s results are inconsistent with those polls purportedly showing in surveys that the public is opposed to the exclusionary rule.³⁹⁰ There is good reason for this observation. Quick survey responses reflect non-deliberative, sound-bite reactions by those questioned.³⁹¹ Such responses usually reflect cynical manipulation of public opinion by politicians seeking to score votes on tough-on-crime propaganda.³⁹² But Bilz’s study asked people to confront a specific case and to deliberate about it carefully. In such measures, people routinely respond in a far less harsh fashion to questions of crime control.³⁹³ It is these responses that best tap an informed, deliberative public’s views.³⁹⁴ It is those views, I have argued at length in another piece, an argument that I will not repeat here, that best contribute to sound understandings of public opinion as a basis for government policy.³⁹⁵

V. CONCLUSION

My goal in this article has been to suggest that the integrity rationale for the exclusionary rule still has theoretical and empirical, if no longer judicial, legs. My argument supports at least this conclusion: the exclusionary rule can be justified on grounds having nothing to do with deterrence but rather with judicial integrity. But I have not addressed whether judicial integrity’s dictates permit exceptions to the exclusionary rule. There might be an argument, for example, that evidence obtained by a constitutional “independent source” *should be* admissible because that source is thereby not “tainted” by unconstitutional action. Thus it does not

³⁸⁸ *See id.*

³⁸⁹ *Id.* at 167.

³⁹⁰ *See supra* text accompanying notes 345–46.

³⁹¹ *See Taslitz, Criminal Republic, supra* note 163, at 173–78.

³⁹² *See id.*

³⁹³ *See id.*

³⁹⁴ *See id.*

³⁹⁵ *See id.*

undermine integrity.³⁹⁶ Bilz herself argues in passing that evidence obtained in good faith would also not involve the Court as an accomplice in wrongdoing—a conclusion that I consider highly debatable.³⁹⁷

Furthermore, it might be argued that judicial integrity is not the only relevant concern and that it must, in some fashion, be weighed against other concerns—and not only that of deterrence.³⁹⁸ That question I also leave for another day.

This piece is thus meant as a first step in reviving the intellectual argument for the integrity rationale. I hope that this piece has laid the foundation for that revival, or at least started a conversation about its continued worth.

³⁹⁶ See TOMKOVICZ, *supra* note 1, at 42–44 (summarizing the independent source doctrine).

³⁹⁷ See Bilz, *supra* note 345, 168–69.

³⁹⁸ See Tonja Jacobi, *The Law and Economics of the Exclusionary Rule*, 87 NOTRE DAME L. REV. 585 (2011) (arguing that the exclusionary rule as now crafted actively harms the innocent).

